Discretion and Disobedience in the Chinese Exclusion Era

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This Article examines the use of prosecutorial discretion from its first recorded use in the nineteenth century to protect Chinese subject to deportation, following to its implications in modern day immigration policy. A foundational Supreme Court case, known as Fong Yue Ting, provides a historical precedent for the protection of a category of people as well as a deeper history of prosecutorial discretion in immigration law. This Article also sharpens the policy argument to protect political activists through prosecutorial discretion and forces consideration for how modern immigration policy should respond to historical exclusions and racialized laws.

This Article centers its analysis of prosecutorial discretion and its use during the Chinese Exclusion Era in the nineteenth century and three key theories explaining as to why government officials used it to limit deportations against Chinese migrants. The first theory of prosecutorial discretion is economic. Government officials and scholars have long pointed to government resources as a key reason for why the Executive Branch uses prosecutorial discretion to refrain from arresting, detaining, or deporting a noncitizen or groups of noncitizens because of limited government resources. A second theory driving prosecutorial discretion is humanitarian. Noncitizens with specific equities that include economic contributions to the United States, long term residence in the United States, service as a primary breadwinner or caregiver to an American family, or presence in the United States as a survivor of sexual assault are among the reasons the government has used to apply prosecutorial discretion to protect individuals or groups of people. A final reason prosecutorial discretion might persist is as a stop gap to anticipated future legislation. These rationales for prosecutorial discretion are well documented in

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domestic immigration history, but this Article is the first to trace these rationales to the Chinese Exclusion era and reveal what may be the greatest untold story about prosecutorial discretion in immigration law. As this Article shows, the story of prosecutorial discretion is informed by these rationales, but also steeped with the political power of the Chinese community, foreign relations between the United States and China, and a mass resistance to a facially racial law.

I. INTRODUCTION

This Article examines the use of prosecutorial discretion to protect Chinese subject to deportation following a foundational nineteenth- century Supreme Court immigration law case, known as *Fong Yue Ting*. Prosecutorial discretion refers to the choice made by the executive branch to refrain from taking immigration enforcement action against a person or group of persons because of limited resources or equities, or both. Government officials and scholars have long pointed to limited government resources as key reasons for why the Executive branch may choose to refrain from arresting, detaining, or deporting a noncitizen or groups of noncitizens. A second theory driving prosecutorial discretion is humanitarian. Noncitizens with specific equities that include economic contributions to the United States, long term residence in the United States,

service as a primary breadwinner or caregiver to an American family, or presence in the United States as a survivor of sexual assault are among the reasons the government has used to protect individuals or groups of people.[1] A final reason prosecutorial discretion might persist is as a stop gap to anticipated future legislation. These rationales for prosecutorial discretion are well documented in domestic immigration history, but this Article is the first to trace these dimensions to the Chinese Exclusion era in what may be the greatest untold story of prosecutorial discretion in immigration law.

Part II describes the Chinese Exclusion era and the Supreme Court jurisprudence to emerge from this era. Part III examines the role of prosecutorial discretion in the wake of *Fong Yue* Ting and challenges the facial argument around "resources" as a basis for prosecutorial discretion. It examines the role humanitarianism and politics played when Chinese were protected. It expands upon a conversation started by Gabriel "Jack" Chin, analyzing the legal history and tension between proponents of the Geary Act, anti-racist views of Congress, and available resources at the executive branch level to deport Chinese. This Part also provides a historical precedent for exercising discretion for a class of people or put another way, for refusing to deport a whole category of people. Part IV examines how acts of civil disobedience relate to the use of prosecutorial discretion with respect to the plaintiffs in *Fong Yue Ting*, who refused to comply with a law. Part V examines contemporary exercises of prosecutorial discretion and the specific rationales that have informed such discretion. Part VI considers the role of civil disobedience in the modern era and contrasts the political actions taken by the Chinese community in resisting to the Geary Act to the actions taken by undocumented or DACA-mented individuals as well as those who resisted the Muslim and African ban. This Part also sharpens the policy argument to protect political activists through prosecutorial discretion. Part VII examines the role of race in historical exclusions and selective enforcement decisions and explores how racial disparities persist even with a more facially neutral statute. This part identifies the ways immigration enforcement and discretion can be improved to limit racial disparities.

II. HISTORY OF CHINESE EXCLUSION

The history of Chinese exclusion in US immigration law is well documented and is crucial to understanding modern immigration law and the shaping of Asian and Asian American identity.[2] In the 1850s, thousands of

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[1] *See, e.g.,* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (NYU Press 2015).

2. *See, e.g.*, Gabriel J. Chin & Daniel K. Tu, *Comprehensive Immigration Reform in the Jim Crow Era: Chinese Exclusion and the McCreary Act of 1893*, 23 ASIAN AM. L.J. 39 (2016); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995); Erika Lee, *The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping,*

Chinese came to California upon the discovery of gold and initially worked as railroad construction workers, and as cooks, and laundrymen.[3] As described by historian Andrew Gyory, "By 1852, about twenty-five thousand Chinese had arrived in Gam Saan, or Gold Mountain, as they called California, some staking claims in the mines, others working as cooks, launderers, and laborers."[4] US encouragement of Chinese labor gave way to the 1868 Burlingame-Seward Treaty, an agreement between the United States and China.[5] The relationship between this treaty and future domestic legislation to limit or prohibit the entry of Chinese persons became the subject of congressional debate.[6]

During the era of Chinese labor and the Burlingame Treaty, the number of Chinese immigrants in the United States was relatively small compared to the native-born population.[7] While employers valued and depended on Chinese laborers, co-existing with this support was hostility towards Chinese.[8] As described by historian Lucy E. Salyer, "A negative image of China and its people, propagated by traders, diplomats, and missionaries visiting that country, preceded the Chinese immigrants. American traders in their travel accounts laid the groundwork for later stereotypes in their descriptions of Chinese as 'ridiculously clad, superstitious ridden, dishonest, crafty, cruel, and marginal members of the human race.'"[9]

In the 1870s, an economic depression in California exacerbated anti-Chinese sentiment and resulted in slogans adopted by the Workingmen's

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1882-1924, 21 J. AM. ETHNIC HIST., Spring 2002; Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853 (1987); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The Plenary Power Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13 (2003); David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015). Throughout this Article, the author uses the term "Chinese" "the Chinese community" "Chinese people" and "Chinese persons and persons of Chinese descent" interchangeably.

3. SALYER, *supra* note 2, at 7; *see also* Emily Ryo, *Through the Back Door: Applying Theories of Legal Compliance to Illegal Immigration During the Chinese Exclusion Era*, 31 LAW & SOCIAL EQUITY 109, 116 (2006) ("When Chinese laborers first entered the UnitedStates during the California Gold Rush of 1848 and the building of the Central Pacific Railroad (1863–1869), they were initially welcomed."); *Chinese Immigration and the Chinese Exclusion Acts*, U.S. DEP'T OF STATE: OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1866-1898/chinese-immigration [https://perma.cc/Y2EX-EV4P] (last visited May 26, 2021).

4. ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT 6 (1998).

5. *See* Morrison G. Wong, *Chinese Americans*, *in* ASIAN AMERICANS: CONTEMPORARY TRENDS AND ISSUES 112 (Pyong G. Min ed., 2d ed. 2006), http://us.corwin.com/sites/default/files/upm-binaries/6035_Chapter_6_Min_I_Proof_2.pdf [https://perma.cc/4MMF-U24T]; *The Burlingame-Seward Treaty, 1868*, U.S. DEP'T OF STATE: OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1866-1898/burlingame-seward-treaty [https://perma.cc/SH7W-8GLM] (last visited May 26, 2021).

6. *See, e.g.*, Joan Fitzpatrick & William McKay Bennett, *A Lion in the Path? The Influence of International Law on theImmigration Policy of the United States*, 70 WASH. L. REV. 589, 589–90 (1995).

7. SALYER, *supra* note 2, at 7–8.

8. *Id.* at 8.

9. *Id.*

Party: "The Chinese must go!"[10] Historian Erika Lee documented how the "deep sense of economic insecurity among the working classes in San Francisco during the depression of the 1870s" increased hostility towards Chinese immigrants.[11] This sentiment grew with the depression years. Immigration scholar and professor Daniel Kanstroom illustrated this sentiment by quoting the words of U.S. Commissioner General of Immigration who five years before holding this position said of Chinese,

> They do not assimilate with our people, do not wear our clothing, do not adopt our customs, language, religion or sentiments . . . . The Chinese coolie will no more become Americanized than an American can take on the habits, customs, garb, and religion of the Mongolian . . . . American and Chinese civilizations are antagonistic; they cannot live and thrive and both survive on the same soil . . . . One or the other must perish.[12]

The events leading to Chinese exclusion were also racial. Lee described the ways white Americans labeled Chinese immigrants as immoral and how people described Chinese prostitutes as causing "moral and racial pollution."[13] In the state of California, Chinese immigrants were prohibited from testifying in cases involving a white person, and attempts were made to ban Asian immigration, which Lee concluded "foreshadowed later laws that would be successful at the national level."[14] During this time, courts singled out Chinese as the only group ineligible for US citizenship or naturalization.[15] Judge Sawyer said in the 1878 case of *In re Ah Yup*:

> "[I]t is entirely clear that [C]ongress intended by [Revised Statutes as amended in 1S75. Rev. St. § 2169] to exclude Mongolians from the right of naturalization. I am, therefore, of the opinion that a native of China, of the Mongolian race, is not a white person within the meaning of the act of [C]ongress."[16]

Finally, Gyory described the ways in which politics influenced federal legislation, arguing:

> "[P]olitics are at the core of the Chinese Exclusion Act. Anti-Chinese hostility, afterall, had been rife in California for twenty-five years before the rest of the country took notice and began responding in the mid-1870s,

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10. *Id.* at 12; *see also Chinese Immigration and the Chinese Exclusion Acts*, U.S. DEP'T OF STATE: OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1866-1898/chinese-immigration [https://perma.cc/TM4N-75MQ] (last visited May 26, 2021).

11. ERIKA LEE, THE MAKING OF ASIAN AMERICA: A HISTORY 90–91 (2015).

12. DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 121 (2010).

13. LEE, *supra* note 11, at 91. For an in-depth account about the history ofexclusion and treatment of Asian American women, see Margaret Hu & Shoba Sivaprasad Wadhia, *The Decitizenship of Asian American Women,* 93 COLO. L. REV. 325 (2022).

14. LEE, *supra* note 11, at 92.

15. SALYER, *supra* note 2, at 13; *see also* In re Ah Yup, 1 F. Cas. 223 (1878).

16. In re Ah Yup, 1 F. Cas. at 224.

> and anti-Chinese imagery had long pervaded the nation during the nineteenth century without precipitating any adverse federal legislation."[17]

A. The Chinese Exclusion Act

Federal laws excluding immigrant groups began in the nineteenth century with an 1803 federal statute that "indirectly regulated the slave trade", the 1862 Coolie Trade Act, and the 1875 Page Act, which prohibited the entry of Chinese prostitutes.[18] In 1882, Congress passed legislation that blocked the entry of Chinese laborers into the United States for a ten-year period and prohibited Chinese from becoming naturalized citizens.[19] This legislation, known as the "Chinese Exclusion Act," included an exemption for Chinese laborers residing in the United States before the effective date and created a provision that would grant such laborers with a certificate should they depart the United States; such laborers could use the certificate to re-enter the United States.[20] The Chinese Exclusion Act also included exemptions for certain laborers, such as teachers and merchants.[21]

The Congress amended the Chinese Exclusion Act in 1888 with the Scott Act to prohibit all Chinese laborers from entering the United States even if they had certificates. As described by English Professor Anthony Sze-Fai Shiu, the Scott Act "dealt the death blow to Chinese Americans' right to return after traveling outside of the United States."[22] This rule change became the subject of a legal challenge by a Chinese laborer who lived in the United States for twelve years, obtained a certificate, left for China, and then returned to the United States only to be denied entry and have his certificate annulled by the Scott Act.[23]

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17. GYORY, *supra* note 4, at 254.

18. Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Legislation,* 54 U.C. DAVIS L. REV. 2021, 2230-33 (2021) ("On its face the law covered both free and enslaved persons, and by including other 'person[s] of color' would have applied to people from Asia, Pacific Islanders, and native peoples from North and South Americas not born in the United States"); George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women under the Page Law, 1875-1882*, 6 J. AM. ETHNIC HIST. 28, 28–29 (1986). Peffer documents the decline in Chinese women to the United States following the Page Act: "The number of Chinese women entering the United States from 1876 to 1882 actually declined 68 percent from the previous seven year period. Thus, the years between the Page Law's enactment and passage of the Exclusion Act produced a Chinese-American community that had grown by more than thirty-two thousand, but whose female population had diminished from 6.4 percent to 4.6 percent of the community during the interval between the 1870 and 1880 censuses." *Id.* at 29. *See also* Hu & Wadhia, *supra* note 13.

19. Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943); *see also* Lee, *supra* note 2*,* at 36.

20. Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943); *see also* Lee, *supra* note 2, at 53-54.

21. Lee, *supra* note 2, at 36. An amendment to section 15 of the Chinese Exclusion Act in 1884 clarified "[t]hat the provisions of this act shall apply to all subjects of made applicable to China and Chinese, whether subjects of China or any other foreign Power …" *See* 48th CONG. SESS. Cas. 219, 220 (1884).

22. Anthony Sze-Fai Shiu, *Marginality's Marginalia: Difference and Plenary Power in Early Asian American Literature*, 15 NEW CENTENNIAL REV., Spring 2015, at 264.

23. *See* Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581 (1889).

The Chinese laborer, Chae Chan Ping, challenged the constitutionality of the Scott Act and further argued that the Act violated the Burlingame-Seward Treaty.[24] In that case, The Supreme Court of the United States held:

> The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone.[25]

Writing for the Supreme Court, Justice Stephen J. Fields deferred to Congress and, by doing so, upheld an explicitly racial law:

> If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation ofwhich the foreigners are subjects.[26]

B. The Geary Act and Fong Yue Ting

The Geary Act of 1892 extended the Chinese Exclusion Act for ten years and directed that all Chinese laborers lawfully residing in the United States before the effective date "apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence . . ."[27] For Chinese laborers unable to obtain a certificate within one year, the Geary Act required them to "establish clearly to the satisfaction of said judge, that by reason of accident, sickness or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, *and by at least one credible white witness*, that he was a resident of the United States at the time of the passage of this act."[28] Important to the history of the Geary Act and to the later discussion about humanitarianism are the exemptions in the Geary Act. As described by historian Beth Lew-Williams, "The Geary Act continued to exempt Chinese merchants, students, and diplomats, but required exempt classes to demonstrate 'affirmative proof' of their right to land."[29]

The Geary Act included criminal and immigration penalties for Chinese livingin the United States without lawful status and for those laborers failing to comply with the certification requirement of applying for and receiving a

24. *Id.* at 589.
25. *Id.* at 609.
26. *Id.* at 606.
27. Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25 (1892) ("Geary Act").
28. *Id*. (emphasis added).
29. BETH LEW-WILLIAMS, THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA 203 (2018).

certificate.[30] Section 3 of the Geary Act presumed that any Chinese person or person of Chinese descent arrested was unlawfully in the United States and required them to affirmatively prove their right to lawfully reside in the United States.[31] Section 4 of the Geary Act stated that any Chinese person or person of Chinese descent found to not be lawfully in the United States "shall be imprisoned at hard labor for a period of not exceeding one year and thereafter removed from the United States."[32]

On the heels of the Geary Act, the Chinese community organized and obtained legal counsel to challenge the law.[33] By the time the case was brought to the Supreme Court, only a fraction of Chinese required to register under the Geary Act had done so.[34] In 1890, there were 93,445 unregistered Chinese living in the United States.[35]

In the 1893 case of *Fong Yue Ting*, the Supreme Court heard the case of Fong Yue Ting and two other Chinese nationals who argued that they were arrested and detained without due process of law.[36] The first two petitioners were Chinese nationals who entered the United States before 1882 and remained in the United States without obtaining a certificate of residency as required by the Geary Act.[37] The third petitioner was a Chinese national who entered the United States before 1882 and produced Chinese witnesses. He was denied a certificate because he did not produce "at least one white witness" to explain why he was entitled to a certificate.[38] All three petitioners had lived in the United States for lengthy periods and were represented by prominent counsel who argued in part that the rights of Chinese people

30. Act of May 5, 1892, ch. 60, § 4, 27 Stat. 25 (1892) ("Geary Act"); *Geary Act (1892)*, IMMIGRATION HISTORY, https://immigrationhistory.org/item/geary-act/ [https://perma.cc/BL5D-Z9X7] (last visited Oct. 31, 2020).

31. Act of May 5, 1892, ch. 60, § 3, 27 Stat. 25 (1892) ("Geary Act"); *see also*, Gabriel Jackson Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, *in* IMMIGRATION LAW STORIES 17 (David Martin & Peter Schuck eds., 2005), https://ssrn.com/abstract=722681 [https://perma.cc/EM56-DYUA]. *See also*, Richard P. Cole & Gabriel J. Chin, *Emerging from the Margins of Historical Consciousness: Chinese Immigrants and the History of American Law*, 17 L. & HIST. REV. 325, 329 (1999) ("In 1892,with the 1882 act expiring, Congress passed the Geary Act. In addition to extending all existing restrictions upon Chinese immigration, it shifted to Chinese aliens the burden to 'establish by affirmative proof' their right to remain inAmerica. To do so, an immigrant had to register with the collector of revenue within one year of the Act's passage. It also provided for a summary deportation proceeding.").

32. Act of May 5, 1892, ch. 60, § 4, 27 Stat. 25 (1892) ("Geary Act"). During this time period, Congress created broaderdeportation rules. For a study and comparison about the twin deportation rules developed for Chinese nationals and everyone else during this time period, see generally, Torrie Hester, *"Protection, Not Punishment": Legislative and Judicial Formation of U.S. Deportation Policy, 1882-1904*, 30 J. AM. ETHNIC HIST., Fall 2010, at 11-36.

33. Chin, *supra* note 31, at 18-19.

34. SALYER, *supra* note 2, at 48.

35. Chin & Tu, *supra* note 2, at 46.

36. Fong Yue Ting v. United States, 149 U.S. 698 (1893).

37. *Id*. at 731–32; *see also*, SALYER, *supra* note 2, at 47-48.

38. *Fong Yue Ting*, 149 U.S. at 731–32; *see also*, SALYER, *supra* note 2, at 47-48.

residing in the United States were protected by the U.S. Constitution and international law.[39]

In *Fong Yue Ting,* the Court upheld the constitutionality of the Geary Act, concluding:

> The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress.[40]

The Court further held that the right to deport noncitizens is "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare."[41]

The holding in *Fong Yue Ting* was controversial in the Court, especially from the justices who saw the rights of a noncitizen outside the United States seeking entry as different from the same person already present in the United States. The dissenters casted deportation as punishment, with Justice Brewer explaining: "Everyone knows that to be forcibly away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel."[42] Also dissenting was Justice Field, who had written the majority opinion in *Chae Chan Ping*. Justice Field drew a sharp line between the posture of both cases. As described by immigration scholar Professor Victor C. Romero: "Unlike the majority, which saw exclusion and deportation as two sides of the same coin of sovereign political power, Field believed that it was the judiciary's duty to ensure that all lawful residents received constitutional protection from '[a]rbitrary and despotic power.'"[43]

In the court of public opinion, the reaction to the outcome in *Fong Yue Ting* varied. As documented by Salyer: "Most white Americans on the West Coast celebrated the Supreme Court's decision, but it had a 'paralyzing effect' in San Francisco's Chinatown according to the San Francisco Morning Call, because 'the confidence in the success of their fight had been so universal and supreme that the defeat stunned the leaders.'"[44]

The doctrine to emerge out of *Chae Chan Ping, Fong Yue Ting,* and its progeny is known as the "plenary power" doctrine, which refers to the power of Congress or the Executive Branch to control immigration without

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39. SALYER, *supra* note 2, at 48.

40. *Fong Yue Ting*, 149 U.S. at 731.

41. *Id*. at 711.

42. Gabriel Jackson Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, *in* IMMIGRATION LAW STORIES 23 (David Martin & Peter Schuck eds., 2005), https://ssrn.com/abstract=722681 [https://perma.cc/7X8C-DP3S] (citing *Fong Yue Ting*).

43. Victor C. Romero, *Elusive Equality: Reflections on Justice Field's Opinions in Chae Chan Ping and Fong Yue Ting*, 68 PENNST. L. REV. 165, 170 (2015).

44. SALYER, *supra* note 2, at 54-55.

interference from the judiciary. As described by immigration scholar Natsu Taylor Saito, "'Plenary' simply means full or complete. The Supreme Court has used this doctrine to say that in certain substantive areas such as immigration law the courts will not intervene because Congress and the executive—the 'political branches' of government—have complete power."[45] As described by immigration scholar Kerry Abrams:

> Under the plenary power doctrine as developed in those and later cases, immigration is put in the same box as foreign affairs, governance of territories, and legislation regarding Native American tribes, all areas in which the Supreme Court has recognized the executive and legislative branches' superior competence over the judicial branch.[46]

These plenary power cases have never been overturned. As documented by migration scholar T. Alexander Aleinikoff, "The 'plenary power' cases—harsh in their implications as they are—have been reaffirmed and even extended in the Constitution's second hundred years."[47]

III. PROSECUTORIAL DISCRETION AFTER FONG YUE TING

The application of the plenary power doctrine to residents in the United States was significant. The outcome in *Fong Yue Ting* created a legal landscape that made it possible for thousands of Chinese persons or persons of Chinese descent to be detained and deported. The practical consequence was different, however. The plaintiffs in *Fong Yue Ting,* Lee Joe, Wong Quan, and Fong Yue Ting were never deported "even though they lost."[48] While the case of *Fong Yue Ting* is a foundational one normally taught in immigration law, the fact that plaintiffs remained in the United States is largely unknown.

The device used to protect the plaintiffs and thousands of unregistered Chinese from deportation was prosecutorial discretion. The term "prosecutorial discretion" refers to the choice made by the agency, which under the Geary Act era included the enforcement of immigration law by the Department of Justice. As defined by former INS Commissioner Doris Meissner in 2000, "'[p]rosecutorial discretion' is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce,

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45. Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The Plenary Power Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 14 (2003). There is a rich body of literature from scholars analyzing the power and limitsof the plenary power doctrine. *See, e.g.*, Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601 (2013); Patrick J. Charles, *The Sudden Embrace of Executive Discretion in Immigration Law*, 55 WASHBURN L.J. 59 (2015); Ernesto Hernandez-Lopez, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAND. J. TRANSNAT'L L. 1345 (2007); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998).

46. Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 615-16 (2013).

47. T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 865 (1989).

48. Chin & Tu, *supra* note 2, at 46.

the law against someone."[49] As defined by the former head of Immigration and Customs Enforcement (ICE), John Morton, "[i]n basic terms, prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual."[50] The story of prosecutorial discretion during the Chinese Exclusion era generally or in the aftermath of *Fong Yue Ting*, in particular, has never been fully examined. This Article is the first to do so.

While the doctrine of prosecutorial discretion in immigration cases was less developed or formalized during the Chinese exclusion era, it was in fact the tool used to protect thousands of Chinese. General authority for prosecutorial discretion was acknowledged by the courts during this time. The courts acknowledged general authority for prosecutorial discretion during this time. One of the earliest cases used by the immigration agency (then within the Department of Justice) to delineate general executive branch authority to exercise prosecutorial discretion was the 1888 case of *United States v. San Jacinto*, when the Supreme Court determined:

> The Constitution itself declares that the judicial power shall extend to all cases to which the United States shall be party, and that this means mainly where it is party plaintiff is a necessary result of the well-established proposition that it cannot be sued in any court without its consent. There must, then, be an officer or officers of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases.[51]

A. Limited Government Resources

Limited government resources played a significant role in the government's choice to use of prosecutorial discretion favorably toward Chinese legally eligible for deportation after *Fong Yue Ting*. It is well

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49. Memorandum from Doris Meissner, Comm'r, Immigr. & Naturalization Serv., to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel, Exercising Prosecutorial Discretion 2 (Nov. 17, 2000), https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Memo-ProsDiscretion.pdf [https://perma.cc/2ET8-Q4EH].

50. Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, to All Field Office Directors, All Special Agents in Charge, All Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 2 (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [https://perma.cc/7F5Z-ZPP8].

51. Memorandum from Sam Bernsen, Gen. Counsel, Immigr. & Naturalization Serv., to Commissioner, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion 2 (July 15, 1976), https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf [https://perma.cc/89FG-6372] (citing United States v. San JacintoTin Co., 125 U.S. 273 (1888)); *see also*, Memorandum from Sam Bernsen, Gen. Counsel, Immigr. & Naturalization Serv., to Commissioner, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion 2–3 (July 15, 1976), https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf [https://perma.cc/225J-3RP4] (citing Confiscation Cases, 74 U.S.(7 Wall.) 454 (1868); United States v. Throckmorton, 98 U.S. 61, 70 (1878); In re Neagle, 135 U.S. 1, 67 (1890)).

documented that the federal government did not have sufficient funds to deport unregistered Chinese laborers.

Historian Beth Lew-Williams documented the resource dimension, and how it interconnected with the surprise by the Chinese community over the outcome at the Supreme Court and the inability of the federal government to carry out what would have been a mass deportation:

> Only 13,243 Chinese had registered by the deadline, leaving as many as a hundred thousand Chinese in the United States subject to immediate deportation. For the first time, the United States could perform mass ethnic cleansing through immigration law. The federalgovernment, however, was not prepared to take this step. In September 1893, Secretary of the Treasury J. G. Carlisle reported tothe Senate that the law had caused a financial crisis. He estimated that at least eighty-five thousand Chinese were 'liable to deportation under the law' and the 'lowest cost for transporting Chinamen from San Francisco to Hong-kong is $35 per capita.'[52]

Said Col. R. G. Ingersoll in 1893:

> The Geary Law, however, failed to provide the ways and means of carrying it into effect, so that the probability is it will remain a dead letter upon the statute book. The sum of money required to carry it out is too large, and the law fails to create the machinery and name the persons authorized to deport the Chinese.[53]

The Appendix to the Congressional Record included copies of correspondence by federal government leaders about the registration process and lack of funds, among them Attorney General Richard Olney, Collector of Internal Revenue, Hon. John Quinn of the Internal Revenue Service, J.G. Carlisle of the Department of Treasury.[54] The following is a summary of some of this correspondence.

In a letter to the House of Representatives, Attorney General Richard Olney acknowledged the relationship between resources and the deportation of Chinese when he stated, "Deportation orders in such cases are also to be executed to the extent of available funds."[55] Olney stated in a telegram to the Attorney General of San Francisco dated September 2, 1893:

> I am advised by the Secretary of the Treasury that there are no funds to execute Geary law so far as same provides for deportation of Chinamen who have not procured certificates of residence. On that state of facts circuit court of United States for southern district of New York made following order: 'Ordered, That [blank] be and he hereby is discharged from the custody of the marshal and ordered to be deported from the United States

52. LEW-WILLIAMS, *supra* note 29, at 204.

53. Col. R. G. Ingersoll & Representative Thomas Geary of California, *Should the Chinese Be Excluded?* (1893), DIGITAL HISTORY, https://www.digitalhistory.uh.edu/disp_textbook_print.cfm?smtid=3&psid=4049 [https://perma.cc/J8JR-9Z8X] (article on Chinese exclusion in the North American Review); *see also*, SALYER, *supra* note 2, at 55.

54. 25 CONG. REC. 2,443–4 (Oct. 12, 1893).

55. *Id*. at 2,444.

> whenever provision for such deportation shall be made by the proper authorities.' Ask court to make similar order in like cases.[56]

Representative Warren Hooker also spoke about the limited resources of the government to detain and deport Chinese people subject to the Geary Act:

> I want to say simply that the Secretary of the Treasury responded, in answer to the resolution of the House, that there were not funds enough on hand to execute the law with regard to these Chinese who had not been deported; that 13,000 of them had been already deported, and that there remained but about $25,000 of the fund appropriated—not enough to deport all, and indeed a very small number. The Secretary of the Treasury said, that being the case, it was prudent probably to suspend the execution of the law and not to fill the jails by unnecessary arrests when these people could not be deported, there being no means for that purpose.[57]

Salyer also documented the congressional history of the Geary Act and limited funds, "Once the Supreme Court upheld the law, the secretary faced the impossible task—with a budget of only $25,000—of arresting and deporting tens of thousands of Chinese. The administration estimated that it would cost $7,310,000 to deport all the Chinese who had not registered."[58] In his book Deportation Nation, Kanstroom noted, "One newspaper sarcastically noted, 'there is no money to deport, and we can't drown them.' In a New York case, a Chinese laborer was released from custody because there was neither money nor a mechanism to enforce the Geary Act."[59]

As documented by Lew-Williams, Assistant U.S. Attorney Willis Witter placed the price to deport Chinese at an even higher amount, at $10,000,000. Said Williams about the U.S. Attorney: "He priced passage from San Francisco to China at fifty-five dollars per capita, marshal's fees at three dollars, attorney fees at ten, detention for at least two weeks at seven, and for

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56. *Id*.

57. *Id*. at 2,451. Hooker continued "Mr. Olney acted on the same principle when he authorized the officers of the law to suspend its execution until otherwise ordered, for want of fundsThe Secretary of the Treasury has said over and over again that if you furnish the funds necessary, and appropriate the amount that is required, he will execute the law to the very extent to which the appropriation goes. We have been toldby the chairman of the committeethat it would take $7,000,000 for the deportation of all that remain, exclusive of the 13,000 already deported. Are you prepared to make that appropriation now? Is the House prepared to increase theexpenditures to that extent, with a Treasury bankrupt, with new bonds and new taxes on the people to pay them." *Id.*

58. SALYER, *supra* note 2, at 55; *see also* Chin & Tu, *supra* note 2, at 46; LEW-WILLIAMS, *supra* note 29, at 205 ("In the fall of 1893, the U.S. Treasury had only $25,502.13 available to enforce the law. In addition, the customs service did not have theresources to arrest and process more than ten thousand Chinese per year, which meant that deportation of all unregistered migrants would likely take a decade or longer. Exclusion had expanded U.S. border control, but it remained a poorly funded arm of the federal government. By failing to comply with internal registration in large numbers, Chinese residents had rendered the Geary Act unenforceable.")

59. KANSTROOM, *supra* note 12, at 120.

Chinese captured anywhere other than San Francisco, the cost of transportation to the port."[60]

B. Humanitarian Backlash

Importantly, any justification to avoid the deportation of an entire group has a humanitarian dimension. The nonenforcement of the Geary Act, with or without resources as a foundation, shows a level of humanitarianism, even if limited, perhaps even by those who were anti-Chinese. Intertwined with resources were other factors that may have been influential. Salyer describes the strong ties within the Chinese American community and diplomatic pressure as additional reasons for why the Geary Act was never implemented.[61] As described in the next section, strong residential ties to the United States and other equities have long informed the use of prosecutorial discretion in immigration cases.

Some members of Congress showed their humanity by their view that the Geary Act was itself inhumane. As documented by Katz:

> Senator Butler of South Carolina voted against the act and called it a "disgrace to the country." Senator Hitt of Illinois pointed out that the legislation reversed the presumption of innocence until proven guilty and held Chinese laborers guilty per se until they could prove otherwise. He stated, "Never before was this system applied to a free people, to a human being, with the exception of the sad days of slavery."[62]

Political leaders also acknowledged the contributions of Chinese laborers. Ingersoll acknowledged the positive contributions of Chinese subject to deportation:

> These Chinese that we wish to oppress and imprison are people who understand the art of irrigation. They can redeem the deserts. They are the best of gardeners. They are modest and willing to occupy the lowest seats. They only ask to be day laborers, washers and boners. They are willing to sweep and scrub. They are good cooks. They can clear lands and build railroads. They do not ask to be masters they wish only to serve.[63]

Declarations reprinted in the Congressional Record in 1893 also point to the contributions of Chinese as domestic servants:

> I have a table which shows that of the Chinamen in San Francisco there are 6,030 employed as domestic servants. They very readily learn to perform all kinds of household duty, are devoted to their employment, and soon become exceedingly skillful . . . . one of the largest farmers in California,

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60. LEW-WILLIAMS, *supra* note 29, at 204–05.

61. SALYER, *supra* note 2, at 57.

62. Ellen D. Katz, *The Six Companies and the Geary Act: A Case Study in Nineteenth-Century Civil Disobedience and Civil Rights Litigation*, 8 W. LEGAL HIST. 227, 255 (1995).

63. Col. R. G. Ingersoll & Representative Thomas Geary of California, *Should the Chinese Be Excluded?* (1893), DIGITALHISTORY, https://www.digitalhistory.uh.edu/disp_textbook_print.cfm?smtid=3&psid=4049 [https://perma.cc/WY4A-CRDY] (article on Chinese exclusion in the North American Review).

> and a man of great intelligence, testified that without the Chinese the wheat and other crops in California could not be harvested and taken to market.[64]

Representative William Draper (R-MA) regarded the Chinese people as people of "inestimable value to California."[65]

C. Geopolitical Influences

Another important topic is the politics or geopolitical influences. Historian Paul Kramer engages this dimension by explaining the exemptions or entry points for Chinese during the Chinese Exclusion era:

> Among the law's stipulations were entry rights given to merchants, students, teachers, and tourists: the "exempt classes," as they were called. These small but significant holes—what might be called imperial openings—permitted 84,116 people to migrate legally between China and the United States during the exclusion era . . . . Where nativist and imperial agendas collided, the resultant policy pursued not a total absence of Chinese migrants, but the vulnerable,subordinated presence and mobility of those groups seen to be advantageous to American power.[66]

Kramer continues: "This is what might be called the politics of imperial anti-exclusion: the selective and hierarchical incorporation of foreign populations as a function of state and corporate efforts to project global power."[67] While the exemptions in the Chinese Exclusion Act could be labeled as a humanitarian gesture, Kramer brings to light the political implications of the act and dimension, and also offers a space to consider whether the aforementioned statements about the value and contributions of Chinese laborers were more about politics and less about humanitarianism.

In passing the McCreary Act in 1893 as an amendment to the Geary Act, Congress extended the registration period for Chinese subject to the certification requirement.[68] The amendments made to the Geary Act by the McCreary Act also widened restrictions to "skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation."[69] The amendments furthermore narrowed the definition of "merchants" to "a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any

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64. 25 CONG. REC. 2,451 (Oct. 12, 1893).

65. Chin & Tu, *supra* note 2, at 52.

66. Paul A. Kramer, *Imperial Openings: Civilization, Exemption, and the Geopolitics of Mobility in the History of Chinese Exclusion, 1868–1910*, 14 J. GILDED AGE & PROGRESSIVE ERA 317, 320 (2015).

67. *Id.*

68. Chin & Tu, *supra* note 2, at 59.

69. Act of Nov. 3, 1893, ch. 14, § 2, as amended, 28 Stat. 7 (1893) ("McCreary Act").

manual labor, except such as is necessary in the conduct of his business as such merchant."[70]

Lew-Williams summarizes the additional enforcement measures imposed by the McCreary Act, "[T]he McCreary amendment also took several new steps to tighten the law. It required two non-Chinese witnesses to prove a merchant's class, required that certificates of residence include photographs, denied bail to Chinese awaiting deportation, required U.S. marshals to carry out all orders for deportations, and ordered the immediate deportation of all Chinese convicted of felonies."[71] The focus on felons was not only part of the law, but as documented by Salyer, was also supported by white Americans and certain Chinese who associated criminality with "the gamblers, opium dealers, and the so-called high binders."[72] This divide between the "good Chinese" and the "bad" Chinese" was drawn by criminal activity but also by class.

By targeting "felons" for deportation, the McCreary Act exposed the limits of humanitarianism.[73] In this way, the McCreary Act was a means by which the Chinese could comply with the registration requirement, and the government could have fewer deportations. The delay was also a result of strong organization within the Chinese American community.[74] Chin describes how the same legislators who supported Chinese exclusion also believed that those already in the United States had some "equitable claims."[75]

Eventually, by 1894 "[t]he registration and deportation of Chinese laborers became an established feature of the administration of the Chinese exclusion laws."[76] As described by Lew-Williams, "In 1894, the Treasury Department reported that 106,811 Chinese had registered. That same year, China retroactively approved the essential aspects of the Geary Act in the Gresham-Yang Treaty. The United States apparently held sufficient power to unilaterally exclude the Chinese and to force Chinese diplomats to go along."[77]

The Gresham-Yang treaty created a treaty basis for the Geary Act and according to one scholar, the Geary Act improved Chinese-American relations.[78]

Katz describes the aftermath of the McCreary Act as one with greater deportations for Chinese prosecuted for noncompliance, but also more Chinese seeking to avoid deportation by showing they met one of the

70. *Id.*
71. LEW-WILLIAMS, *supra* note 29, at 207.
72. SALYER, *supra* note 2, at 57.
73. Act of Nov. 3, 1893, ch. 14, § 6, as amended, 28 Stat. 7 (1893) ("McCreary Act").
74. SALYER, *supra* note 2, at 57.
75. Chin & Tu, *supra* note 2, at 68.
76. SALYER, *supra* note 2, at 57.
77. LEW-WILLIAMS, *supra* note 29, at 207.
78. Katz, *supra* note 62, at 268.

McCreary Act's exemptions. In this way, there was a shift from a resistance-based approach to using the one that relied on the existing legal framework to reach the same outcome: protection from deportation.

"Some laborers avoided deportation by demonstrating their inability to obtain certificates; others established that they had become laborers only after the registration period had ended . . . . [M]any Chinese aliens avoided deportation by demonstrating their exemption from the harsher provisions of the legislation."[79]

Professor Jon Weinberg documents how the government limited deportations following the McCreary Act:

> Federal authorities for the next three years wielded their authority lightly, seeking to deport only a relatively small number of Chinese without certificates, nearly all of them felons. By 1896, the Department of the Treasury began to cast its net somewhat more widely, arresting a more diverse group of Chinese residents deemed to lack proper documents. By that time, though, the registration and deportation of Chinese laborers had become well settled.[80]

As this section shows, the story of prosecutorial discretion after *Fong Yue Ting* is complex and involved many factors that went beyond limited resources and humanitarianism. It is also important to consider the progression of the law's enforcement. How the story unfolds also matters as the laws were eventually interpreted and crafted in ways that allowed for greater immigration enforcement against Chinese who failed to register and created as well as more incentives to register in the first place. With that said, the resistance by the Chinese community to the Geary Act was a remarkable act of civil disobedience and is a story that must be told.

IV. CIVIL DISOBEDIENCE AFTER FONG YUE TING

A. Resistance to the Geary Act

Scholars have documented the role of Chinese Six Companies in using a variety of tools to challenge the Geary Act. The Chinese Six Companies, also known as the Chinese Consolidated Benevolent Association, was a coalition of six organizations who spoke on behalf of the Chinese community and who led a campaign against the Geary Act. As described by Katz, "The leaders of the Six Companies were merchants in the Chinese immigrant community generally regarded as men of education and ability."[81] Katz

79. *Id.*

80. Jonathan Weinberg, *Proving Identity*, 44 PEPP. L. REV. 731, 754 (2017).

81. Katz, *supra* note 62. Beyond the scope of this article, but an important dimension to this discussion, is the relationship between political activism by immigrants and the First Amendment. *See, e.g.*, Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237 (1937).

describes the Six Companies as "unquestionably the most important organization in Chinese-American society in the 19th century."[82] Salyer describes the Six Companies as an "advocate for the Chinese community in the white world."[83]

The Six Companies played a significant role in influencing the Chinese community to resist, posting flyers throughout San Francisco and notifying the Chinese community of their intent to challenge the Geary Act.[84] In her research on the Six Companies, Katz describes how the Six Companies convinced most Chinese laborers to ignore the Geary Act and risk their deportation.[85] Correspondence by Quinn with the Six Companies in a response to a "proclamation" suggests that the pressure placed on Chinese by the Six Companies was high: "The proclamation is also understood to direct such laborers not to comply with the law and cautions them of certain losses and other curtailment of privileges to be imposed by the said Six Companies in case the said laborers register contrary to the proclamation."[86] The Six Companies had believed that civil disobedience in the form of noncompliance, diplomatic pressure, and lawsuits would invalidate the law. However, as the outcome in *Fong Yue Ting* revealed, they made a "disastrous miscalculation."[87]

The strategy of civil disobedience was also informed by the Six Companies knowledge about the prospect of future legislation and the lack of resources. Katz describes this strategy aptly in her research:

> Indeed, it appears likely that the leaders of the Six Companies anticipated the McCreary legislation when they first promoted civil disobedience on a national scale. While they sought judicial invalidation of the Geary Act, they knew that the nonregistration campaign would make the act, even if it were constitutionally valid, an administrative nightmare impossible to

82. Katz, *supra* note 62, at 232 (quoting Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CALIF. L. REV. 529, 540-41 n.57 (1984)). The influence of the SixCompanies was not without criticism. Katz describes, "Representative Thomas Geary, the original sponsor of the act,attributed Chinese noncompliance to the coercive practices of the Six Companies. He accused the association of manipulating the Chinese population, alleging that 'The edict of these Six Companies is more powerful and far- reaching than an edict of the Czar of Russia.' . . . Geary's belief that Six Companies had manipulated the Chinese community into noncompliance was widely shared. One journalist in California, Richard Hay Drayton, wrote that the Six Companies had imposed a 'forced contribution of one dollar per head' on all Chinese immigrants." *Id.* at 257.

83. SALYER, *supra* note 2, at 40. Importantly, the Six Companies did not advocate for all Chinese. There were different immigrant organizations such as family associations and "Triads" or "tongs." *Id.* at 41. Beyond the scope of this articlewas the infighting among these organizations and within the Chinese community.

84. *Id.* at 47.

85. Katz, *supra* note 62, at 227–28, 230 ("The Six Companies convinced more than eighty-five thousand Chinese laborers nationwide—87 percent of those targeted by the act—to ignore the congressional order and risk deportation.").

86. 25 CONG. REC. 2,443 (Oct. 12, 1893).

87. Katz, *supra* note 62, at 227–28, 230. The author thanks Gabriel "Jack" Chin for observing how the Chinese community may have acted differently had they been told that the Supreme Court would uphold the Geary Act.

> implement. Thus, while Congress would not enact legislation protecting the rights of Chinese laborers, the association knew that the prospect of deporting thousands of Chinese aliens presented an administrative and financial burden that would prompt congressional action.[88]

The resistance by the Chinese community to the Geary Act played a meaningful role in protecting them the same from deportation from the United States. Says Katz:

> In sum, the Six Companies coordinated a multifaceted campaign against the Geary Act, organizing grass-roots opposition nationwide,and exhausting legal and diplomatic channels at the highest levels ofgovernment. The campaign is remarkable because members of an immigrant benevolent society believed they could defeat a federal law. Even more remarkable, however, is that they nearly did just that.[89]

The campaign by the Six Companies offers an important window into the power of resistance and the way it might influence legal challenges when exercised on a broad scale.

Importantly, the Six Companies did not support prosecutorial discretion for *all* Chinese laborers. As documented by Salyer, the Six Companies "aided in the apprehension of Chinese felons, as well as prostitutes"[90] Thus, the Six Companies furthered the division between "good Chinese" and "bad Chinese" by aiding in apprehending and deporting felons and sex workers.

The Six Companies' strategy was not without risk. Chinese laborers refusing to register not only risked expulsion but also abdicated the opportunity for valid documents and legal status through proper registration. Under the Geary Act, Chinese laborers could have registered and received formal legal status, but they gave up this opportunity through resistance. In this way, Chinese who resisted sacrificed more personal benefits than undocumented persons showcased later in this section persons living in the United States. without status or a pathway to legal status.

Even if lack of resources was the main reason given for resources were the main force behind the nonenforcement of the Geary Act against Chinese who did not register, the Department of Treasury surely had the resources to deport the three plaintiffs, but it did not. By contrast, the political activists in the modern immigration era have been more vulnerable to immigration enforcement based on their political activities and immigration status, even when represented by sophisticated counsel. Perhaps it was the political power and organization of the Six Companies that yielded a different outcome for those who resisted the Geary Act resisters versus in contrast to modern political activists in the modern era. At the very least, an examination of civil disobedience and prosecutorial discretion reveals nuances within the

88. *Id.* at 230.
89. *Id.* at 271.
90. SALYER, *supra* note 2, at 89–90.

three explanations of prosecutorial discretion: resources, humanitarian factors, and promised legislation, flexed with political influences and times.

V. CONTEMPORARY EXERCISES OF PROSECUTORIAL DISCRETION

As the previous section shows, prosecutorial discretion has been a significant part of the immigration system since the late 1800s. It has long been understood that limited government resources are a key reason for why the Executive Branch may choose to refrain from arresting, detaining, or deporting a noncitizen or groups of noncitizens. A second theory driving prosecutorial discretion is humanitarian. The government has applied prosecutorial discretion for individuals such as noncitizens with specific equities that include economic contributions to the United States, long term residence in the United States, service as a primary breadwinner or caregiver to an American family, or presence in the United States as a survivor of sexual assault are among the reasons the government have used to apply prosecutorial discretion in order to protect individuals or groups of people.[91] A final reason prosecutorial discretion might persist is as a stop gap to anticipated future legislation. Many of same the factors that drive contemporary prosecutorial discretion played a role in the wake of *Fong Yue Ting* as showcased in the previous section.

Federal immigration agencies have discretionary authority at every stage of immigration enforcement, including the choice to arrest, detain, place in removal proceedings, or deport even after a removal order has been entered.[92] The legal foundation for prosecutorial discretion is well documented[93] and can be traced to the U.S. Constitution's Take Care Clause, Immigration and Nationality Act, Homeland Security Act, regulations, and guidance documents.[94] With this foundation, what follows is an examination of the three principles that have long informed prosecutorial discretion: limited resources, humanitarian factors, and the promise of new legislation.

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91. Shoba Sivaprasad Wadhia, *Beyond Deportation: Understanding Immigration Prosecutorial Discretion and United States v. Texas*,36 IMMIGR. & NAT'Y L. REV. 94, 121–22 (2016); *see also* Chin & Tu, *supra* note 2, at 39.

92. *See generally* WADHIA, *supra* note 1, at 11-12*; see also Memorandum from Sam Bernsen, Gen. Counsel, Immigr. & Naturalization Serv., to Commissioner, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion supra* note 51, at 6–7 *(July 15, 1976),* https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf [https://perma.cc/G5VY-CRUK]; *see also* Letter from Shoba Sivaprasad Wadhia & Others, to the White House, (Sept. 3, 2014) (supporting the legalauthority of executive action in immigration law and signed by 136 law professors), https://pennstatelaw.psu.edu/_file/Law-Professor-Letter.pdf [https://perma.cc/3SYZ-HXZ9].

93. Kate Manuel & Todd Garvey, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, *in* U.S. CONGRESSIONAL RESEARCH SERVICE 8–13 (2013).

94. *See* U.S. CONST. art. II, § 3; see Immigration and Nationality Act, 8 U.S.C. § 1101 (1952); *see* Homeland Security Act of 2002, 6 U.S.C. § 101 (2002); *see also* Shoba Sivaprasad Wadhia, *Response: In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX.L. REV. 64–68 (2013).

A. Resources

One reason agency leaders emphasize discretionary choices early in the enforcement process is because of resources. As described in a 1976 Memo from former INS Commissioner Sam Bernsen:

> Deportation proceedings tie up Government manpower and resources that could be used in performing other important functions. Given the present illegal alien problem such a use of scarce resources on aliens whom the Service does not ultimately intend to deport is indefensible.[95]

In 2000, former INS Commissioner Doris Meissner remarked, "Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations."[96] More than ten years later, the former ICE head John Morton detailed in a 2011 memo:

> ICE, however, only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States. In light of the large number of administrative violations the agency is charged with addressing and the limited enforcement resources the agency has available, ICE must prioritize the use of its enforcement personnel, detention space, and removal resources to ensure that the removals the agency does conduct promote the agency's highest enforcement priorities, namely national security, public safety, and border security.[97]

Similarly, a former opinion from the Department of Justice Office of Legal Counsel dated 2014 noted:

> The resource constraints are striking. As noted, DHS has informed us that there are approximately 11.3 million undocumented aliens in the country, but that Congress has appropriated sufficient resources for ICE to remove fewer than 400,000 aliens each year, a significant percentage of whom are typically encountered at or near the border rather than in the interior of the country.[98]

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95. Memorandum from Sam Bernsen, Gen. Counsel, Immigr. & Naturalization Serv., to Commissioner, Legal OpinionRegarding Service Exercise of Prosecutorial Discretion, *supra* note 51, at 7. (July 15, 1976), https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf [https://perma.cc/FWF9-XQ7C].

96. Memorandum from Doris Meissner, Comm'r, Immigr. & Naturalization Serv., to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel, Exercising Prosecutorial Discretion, *supra* note 49, at 4.

97. Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, to All ICE Employees, Civil ImmigrationEnforcement: Priorities for the Apprehension, Detention, and Removal of Aliens 1 (Mar. 2, 2011), https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf [https://perma.cc/GG56-8AB5]. *supra* note 50, at 1.

98. Prioritizing and Deferring Removal of Certain Aliens Unlawfully Present in the United States, 38 OP. O.L.C. 39, 50(2014).

More recently, then-Acting Secretary of Homeland Security David Pekoske announced an agency-wide review of immigration enforcement, a 100 day "pause" on removals for those with a final order of removal subject to certain exceptions, and three temporary enforcement priorities:

> (1) national security, (2) border security, and (3) public safety.[99] This memorandum, noted, "in crafting this memorandum that "[d]ue to limited resources, DHS cannot respond to all immigration violations or remove all persons unlawfully in the United States. Rather, DHS must implement civil immigration enforcement based on sensible priorities and changing circumstances."[100]

On February 18, 2021, ICE acknowledged limited resources when it issued interim guidance in support of civil enforcement priorities. "Like other national security and public safety agencies, ICE operates in an environment of limited resources. Due to these limited resources, ICE has always prioritized, and necessarily must prioritize, certain enforcement and removal actions over others."[101]

Because of limited resources, most guidance documents from the agency have encouraged the use of prosecutorial discretion at the earliest stage of immigration enforcement. For example, the Meissner Memo noted, "As a general matter, it is better to exercise favorable discretion as early in the process as possible, once the relevant facts have been determined, in order to conserve the Service's resources and in recognition of the alien's interest in avoiding unnecessary legal proceedings."[102] Similarly, former Chief Counsel for ICE William J. Howard instructed his lawyers in 2005 that, "It is not wise or efficient to place an alien into proceedings where the intent is to allow that person to remain unless, where compelling reasons

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99. Memorandum from David Pekoske, Acting Sec'y, Homeland Sec., to Troy Miller, Senior Off. Performing Duties ofComm'r, U.S. Customs & Border Prot., Tae Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, Tracey Renaud, Senior Off. Performing Duties of Dir., U.S. Citizenship & Immigr. Serv., Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities 1 (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [https://perma.cc/W25Q-MS75]; *see also*, Shoba Sivaprasad Wadhia, *Prosecutorial Discretion in a Biden Administration*, YALE J. ON REGUL. NOTICE & COMMENT (Jan. 21, 2021), https://www.yalejreg.com/nc/prosecutorial-discretion-in-a-biden-administration-by-shoba-sivaprasad-wadhia/ [https://perma.cc/7E98-HRS3].

100. Memorandum from David Pekoske, Acting Sec'y, Homeland Sec., to Troy Miller, Senior Off. Performing Duties of Comm'r, U.S. Customs & Border Prot., Tae Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, Tracey Renaud, Senior Off. Performing Duties of Dir., U.S. Citizenship & Immigr. Serv., Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities, *supra* note 99, at 2.

101. Memorandum from Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, to All ICE Employees, InterimGuidance: Civil Immigration Enforcement and Removal Priorities 2 (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf [https://perma.cc/42DW-UXTW].

102. Memorandum from Doris Meissner, Comm'r, Immigr. & Naturalization Serv., to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel, Exercising Prosecutorial Discretion, *supra* note 49, at 6.

exist, a stayed removal order might yield enhanced law enforcement cooperation."[103]

In a memorandum from then-Office of the Principal Legal Advisor (OPLA)), John D. Trasvina stated:

> While discretion may be exercised at any stage of the process and changed circumstances for an individual denied prosecutorial discretion at one stage may warrant reconsideration at a later stage, discretion generally should be exercised at the earliest point possible, once relevant facts have been established to properly inform the decision.[104]

Finally, a memorandum from September 30, 2021 from DHS Secretary Alejandro N. Mayorkas (Mayorkas Memo) on final guidelines for immigration enforcement plainly stated that opens "We [DHS] do not have the resources to apprehend and seek the removal of every one of these noncitizens. Therefore, we need to exercise our discretion and determine whom to prioritize for immigration enforcement action."[105] In April 2022, Principal Legal Advisor Kerry Doyle issued updated guidance to track the priorities in the Mayorkas Memo for attorneys appearing before U.S. immigration courts.[106] The Doyle Memo also acknowledges the limited resources of ICE: "Wherever possible, decisions to exercise prosecutorial discretion should be made at the earliest moment practicable to best conserve prosecutorial resources."[107]

B. Humanitarian Factors

Beyond resources, humanitarian factors and the contributions of individuals to the United States have also informed prosecutorial discretion,

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103. Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigr. & Customs Enf't, to All OPLA ChiefCounsel, Prosecutorial Discretion 3 (Oct. 24, 2005), https://asistahelp.org/wp-content/uploads/2018/11/DHS-OPLA-NTA-memo-Prosecutorial-Discretion.pdf [https://prma.cc/4FNV-DBP2].

104. Memorandum from John D. Trasviña, Principal Legal Advisor, U.S. Immigr. & Customs Enf't, to All OPLA Attorneys, Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities 4 (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf [https://perma.cc/7GTF-BNNW].

105. Memorandum from Alejandro N. Mayorkas, Sec'y, Dep't of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, Guidelines for the Enforcement of Civil Immigration Law 5 (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [https://perma.cc/A6EJ-EYEL]. While the application of the Mayorkas Memo is on hold because of litigation, its contents are still useful for examining modern prosecutorial discretion policy.

106. Memorandum from Kerry E. Doyle, Principal Legal Advisor, U.S. Immigr. & Customs Enf't, to All OPLA Attorneys, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion (April 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf [https://perma.cc/4KJM-QG6M].

107. *Id.* at 9.

particularly in the modern era. An Operations Instruction from 1975 issued by the former Immigration and Naturalization Service contained factors for INS agents and officers to determine whether a case should be referred for deferred action. They included: (i) young or old age; (ii) years present in the United States; (iii) health condition requiring care in the United States; (iv) impact of removal on family in United States; and (v) criminal or other problematic conduct.[108]

The Meissner Memo identified humanitarian factors: "family ties in the United States; medical conditions affecting the alien or the alien's family; the fact that an alien entered the United States at a very young age; ties to one's home country (e.g., whether the alien speaks the language or has relatives in the home country); extreme youth or advanced age; and home country conditions" as among that which should be considered by officers when deciding if discretion should be use favorably to protect a noncitizen from deportation.[109]

Similarly, the Morton Memo lists factors, that include family ties, contributions to the communities, and length of residence in the United States as considerations for favorable prosecutorial discretion.[110] Acting ICE Director Johnson advised officers to pay "particular attention" to cases where noncitizens are "elderly or are known to be suffering from serious physical or mental illness" when exercising prosecutorial discretion, again underscoring the humanitarian dimension of this discretion.[111]

The humanitarian dimension of prosecutorial discretion was also showcased in a policy issued by the former Secretary of Homeland Security Janet Napolitano in 2012, which allowed qualifying childhood arrivals to the United States without status who are in school or graduated and meet other requirements to request a "deferred action", which is a kind of protection

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108. Shoba Sivaprasad Wadhia, Samuel Weiss Faculty Scholar, Clinical Professor of Law, Director, Center for Immigrants' Rights Clinic at Penn State Law, *The Administration's Apparent Revocation of Medical Deferred Action for Critically Ill Children: Hearing Before the H.R. Subcomm. on Civil Rights and Civil Liberties of the Comm. on Oversight & Reform*, 116th Cong., at 6 (Sept. 11, 2019) (testimony before the H.R. Subcomm. on Civil Rights and Civil Liberties of the Comm. on Oversight & Reform, 116th Cong., of Shoba Sivaprasad Wadhia), https://www.congress.gov/116/meeting/house/109892/witnesses/HHRG-116-GO02-Wstate- WadhiaS-20190911.pdf [https://perma.cc/WTC9-HHL5]; WADHIA, *supra* note 1, at 64; (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii) (1975).

109. Memorandum from Doris Meissner, Comm'r, Immigr. & Naturalization Serv., to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel, Exercising Prosecutorial Discretion, *supra* note 49, at 7.

110. Shoba Sivaprasad Wadhia, *The Morton Memo and Prosecutorial Discretion: An Overview*, IMMIGR. POL'Y CTR., at 5–6 (July 2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/Shoba_-_Prosecutorial_Discretion_072011_0.pdf [https://perma.cc/HB7G-V9QK].

111. Memorandum from Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, to All ICE Employees, InterimGuidance: Civil Immigration Enforcement and Removal Priorities *supra* note 101, at 5 (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf [https://perma.cc/42DW-UXTW].

from deportation.[112] Known as Deferred Action for Childhood Arrivals or DACA, the policy was an American success story and enabled nearly 800,000 people to go to school, work, and live freely while being undocumented outside of the shadows.[113] The contributions of those with benefitting from DACA were evident even as the Trump administration tried to end the policy in 2017. These contributions surfaced in court documents and in judicial opinions about the effects of DACA in the United States.[114] One court filing documented that nearly 30,000 DACA recipients were frontline workers in the healthcare industry.[115]

Former OPLA Trasvina also listed humanitarian factors in his May 27, 2021, guidance for ICE attorneys regarding prosecutorial discretion decisions, including but not limited to time in the United States; immigration status; employment and education history in the United States; and

112. *See* Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs., John Morton, Dir., U.S. Immigr. & Customs Enf't, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/B2N3-ZPDB]; WADHIA, *supra* note 1, at 88–108; Shoba Sivaprasad Wadhia, *The President and Deportation: DACA, DAPA, and the Sources and Limits of Executive Authority - Response to Hiroshi Motomura*, 55 WASHBURN L.J. 189, 189–90 (2016); Shoba Sivaprasad Wadhia, *Response: In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. 59 (2013); *see also,* Declaration by Shoba Sivaprasad Wadhia, at 20, State of Texas v. United States, (S.D. Tex. July 17, 2019), https://53dfb3eb-5e7d-464c-87ed-33d8164eb4b0.filesusr.com/ugd/6e1c09_3ec691484e4947b38138e7a5d6a08ba4.pdf [https://perma.cc/LTB3-9UUB].

113. Tom K. Wong et al., *DACA Recipients' Economic and Educational Gains Continue to Grow*, CTR. FOR AM. PROGRESS (Aug. 28, 2017, 9:01 AM), https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca- recipients-economic-educational-gains-continue-grow/ [https://perma.cc/TM4F-APMU]; Liz Mineo, *Rise in Social Mobility of DACA Recipients*, THE HARVARD GAZETTE (Nov. 12, 2019), https://news.harvard.edu/gazette/story/2019/11/study-tracks-dacas-benefits- limitations-for-undocumented/ [https://perma.cc/MAC4-7X4X].

114. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913–14 (2020); Letter from Michael J. Wishnie, Counsel of Record Rec. for *Batalla Vidal*-Respondents, Muneer I. Ahmad & Marisol Orihuela, Jerome N. Frank Legal Servs. Org., Trudy S. Rebert, Araceli Martínez-Olguín & Mayra B. Joachin, Nat'l Immigr. L. Ctr., Karen C. Tumlin, Cooperating Att'y, Jerome N. Frank Legal Servs. Org., Amy S. Taylor & Paige Austin, Make the Road N.Y.& others toScott S. Harris, Clerk of the Supreme Court of the United States, Re: *Wolf, et al., v. Batalla Vidal, et al.*, No. 18-589 (Mar. 27, 2020), https://www.nilc.org/wp-content/uploads/2020/03/Letter-to-Supreme-Court-2020-03-27.pdf [https://perma.cc/9DKW-LUGV].

115. Letter from Michael J. Wishnie, Counsel of Record for *Batalla Vidal*-Respondents, Muneer I. Ahmad & MarisolOrihuela, Jerome N. Frank Legal Servs. Org., Trudy S. Rebert, Araceli Martínez-Olguín & Mayra B. Joachin, Nat'l Immigr. L. Ctr., Karen C. Tumlin, Cooperating Att'y, Jerome N. Frank Legal Servs. Org., Amy S. Taylor & Paige Austin, Make the Road N.Y. to Scott S. Harris, Clerk of the Supreme Court of the United States, Re: *Wolf, et al., v. Batalla Vidal, et al.*, No. 18-589 (March 27, 2020), https://www.supremecourt.gov/DocketPDF/18/18-589/139241/20200327101941772_2020%2003%2027%20Letter%20to%20Court%20for%2018-589.pdf].

humanitarian factors such as poor health, age or role as a primary caregiver to an ill relative in the United States.[116]

DHS Secretary Mayorkas published similar mitigating factors in his department-wide guidance published on September 30, 2021, and also elaborated on the role of prosecutorial discretion when people are exercising their First amendment, workplace, or labor rights.[117]

Importantly however, the humanitarian aspects of prosecutorial discretion continue to be complex and controversial. To illustrate, critics of DACA have argued about the ways the disqualifications based on criminal grounds have excluded certain whole categories based on criminality. Specifically, those who "[h]ave been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety" are ineligible for DACA.[118] Further, former President Barack Obama, in announcing a never- operational deferred action policy in 2014 known as DAPA, used the phrase "Families Not Felons" when describing the immigrant worthy of protection and as opposed to the one for whom enforcement is appropriate: "And that's why we're going to keep focusing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids."[119] Additionally, many of the civil enforcement priorities listed in guidance documents from the immigration agency label those who have a criminal history as priorities for detention and deportation. In each of these cases, the "felons" may in fact also have families, a lengthy residence, or contributions to the community. In earlier work, the author has examined this concern and called for a prosecutorial discretion policy where "a person's equities are the primary feature of the calculus, and where no one factor is fatal to a prosecutorial discretion decision."[120] An in-depth application of immigration enforcement

116. Memorandum from John D. Trasviña, Principal Legal Advisor, U.S. Immigr. & Customs Enf't, to All OPLA Attorneys, Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities *supra* note 104, at 5–6 (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration- enforcement_interim-guidance.pdf [https://perma.cc/GFS5-CRDX].

117. *See generally* WADHIA, supra note 1, at 11-12*; see also*, Memorandum from Sam Bernsen, Gen. Counsel, Immigr. & Naturalization Serv., to Commissioner, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion, *supra* note 51, at 6–7; *see also* Letter from Shoba Sivaprasad Wadhia & others to the White House, (Sept. 3, 2014) (supporting the legal authority of executive action in immigration law and signed by 136 law professors), https://pennstatelaw.psu.edu/_file/Law-Professor-Letter.pdf [https://perma.cc/3SYZ-HXZ9].

118. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca [https://perma.cc/X86S-MRHR] (last visited July 30, 2021).

119. Press Release, President of the United States, *Remarks by the President in Address to the Nation on Immigration* (Nov. 20, 2014), THE WHITE HOUSE (Nov. 20, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration [https://perma.cc/49CR-JM95].

120. *See* WADHIA, *supra* note 1, at 147-148.

and discretion to the "good immigrant" and the "bad immigrant" is beyond the scope of this Article, but deeply intertwined with institutional and individual understandings of humanitarianism.[121]

C. Promise of New Legislation

The use of prosecutorial discretion in immigration law has also been tied to the promise of future legislation. For example, on the heels of a legalization program enacted by Congress and signed by then President Ronald Reagan in 1986,[122] the executive branch extended protection to certain spouses and children in the United States. As described in a New York Times article: "The Federal Immigration Commissioner, Gene McNary, said recently that as many as 1.5 million illegal aliens could be affected by the new policy, called 'family fairness,' and intended to allow close family members of legalized immigrants to remain in the country under certain conditions."[123] As described by the American Immigration Council:

> From 1987 to 1990, Presidents Ronald Reagan and George Bush, Sr. used their executive authority to protect from deportation a group that Congress left out of its 1986 immigration reform legislation— the spouses and children of individuals who were in the process of legalizing. These "Family Fairness" actions were taken to avoid separating families in which one spouse or parent was eligible for legalization, but the other spouse or children living in the United States were not—and thus could be deported, even though they would one day be eligible for legal status when the spouse or parent legalized.[124]

The agency has also used prosecutorial discretion as a stop gap to legislation for survivors of crime and certain battered or abused immigrants. For decades, former INS and now U.S. Citizenship and Immigration Services (USCIS) has extended deferred action to those eligible for permanent residency based on a VAWA Self Petition.[125] Some family members who

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121. *See e.g.*, M. Isabel Medina, *Reflections on the DACA Cases in the Supreme Court—The "Illusion of Freedom*,*"* 99 N.C. L. REV. F. 101 35 (2020); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207 (2012).

122. Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359 (1986).

123. Marvine Howe, *New Policy Aids Families of Aliens*, N.Y. TIMES, (Mar. 5, 1990), at B3. https://www.nytimes.com/1990/03/05/nyregion/new-policy-aids-families-of-aliens.html [https://perma.cc/E7TJ-SAWP].

124. *Reagan-Bush Family Fairness: A Chronological History*, AM. IMMIGR. COUNCIL (Dec. 2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/reagan_bush_family_fairness_final_0.pdf [https://perma.cc/8NKM-B9D5]; *see also* Marvine Howe, *New Policy Aids Families of Aliens*, N.Y. TIMES, (Mar. 5, 1990), at B3, https://www.nytimes.com/1990/03/05/nyregion/new-policy-aids-families-of-aliens.html [https://perma.cc/FUH9-CJCX].

125. See, e.g., WILLIAM A. KANDEL, U.S. CONG. RSCH. SERV., IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (VAWA) 4 (May 15, 2012), https://fas.org/sgp/crs/misc/R42477.pdf

have an approved VAWA Self Petition may still have to wait for a prolonged period before they are become eligible to receive a visa because of the statutory limitations in the U.S. family-based immigration system.[126] As a measure of protection, the agency provides deferred action for such family members until they qualify for durable status and in this case, a green card. Deferred action is also extended to survivors who qualify for a U nonimmigrant status but who are unable to receive it immediately because of the statutory cap of 10,000 U statuses placed by Congress.[127]

Former DHS Secretary Janet Napolitano also implemented a deferred action policy for the widows and widowers of U.S. citizens.[128] Recognizing that a long term solution required legislation, DHS noted, "Secretary Napolitano's directive provides a short- term arrangement for widow(er)s of deceased U.S. citizens, legislation is required to amend the definition of 'immediate relatives' in the Immigration and Nationality Act to permit surviving spouses to remain indefinitely after the U.S. citizen spouse dies, enabling them to seek permanent resident status."[129] Eventually, Congress did pass legislation to allow for qualifying widows and widowers who were married to a U.S. citizen at the time of their death to seek permanent residency.[130]

[https://perma.cc/9KFJ-7V75]; *The Administration's Apparent Revocation of Medical Deferred Action for Critically Ill Children: Hearing Before H. Comm. on Oversight and Reform Subcomm. On C.R. and C.L.*, 116th Cong. (2019) (statement of Shoba Sivaprasad Wadhia, Samuel Weiss Fac. Scholar, Clinical Professor at Law, Dir., Ctr. for Immigrants' Rts. Clinic, Pa. State Univ.), https://docs.house.gov/meetings/GO/GO02/20190911/109892/HHRG-116-GO02-Wstate-WadhiaS-20190911.pdf [https://perma.cc/VP7Q-4XR2].

126. INA Immigration and Nationality Act § 204(a)(1)(A), 8 U.S.C. § 1154(a)(1)(A); WADHIA, *supra* note 1, at 54-87; DHS's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S., 38 Op. O.L.C. 39, 18–1961-62 (2014), https://www.justice.gov/olc/file/2014-11-19-dapa-daca-wd/download [https://perma.cc/728K-UGTV]. https://www.justice.gov/file/179206/download [https://perma.cc/UR9X-8W9U].

127. 8 CFR § 214.14 (2021); WADHIA, *supra* note 1, at 54–87; Prioritizing and Deferring Removal of Certain Aliens Unlawfully Present in the U.S., 38 Op. O.L.C. 39, 58-59 (2014), https://www.justice.gov/olc/file/2014-11-19-dapa-daca-wd/download [https://perma.cc/DX93-3URR]. DHS's Authority to Prioritize Removal of Certain Aliens Unlawfully Present, 38 Op. O.L.C. at 15–16 (2014), https://www.justice.gov/file/179206/download [https://perma.cc/D7UV-6UFN].

128. *DHS Establishes Interim Relief for Widows of U.S. Citizens*, U.S. DEP'T OF HOMELAND SEC. (June 9, 2009), https://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens#:~:text=%E2%80%9CGranting%20deferred%20action%20to%20the,their%20legal%20status%20is%20reso lved.%E2%80%9D [https://perma.cc/XUT3-Y8X3]; WADHIA, *supra* note 1, at 57; *see also*, Prioritizing and Deferring Removal of Certain Aliens Unlawfully Present in the U.S., 38 Op. O.L.C. 39, 60 (2014), https://www.justice.gov/olc/file/2014-11-19-dapa-daca-wd/download [https://perma.cc/EH7B-3S7M]. DHS's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others, 38 Op. O.L.C. at 17 (2014), https://www.justice.gov/file/179206/download [https://perma.cc/X9PB-4QBW].

129. *DHS Establishes Interim Relief for Widows of U.S. Citizens*, U.S. DEP'T OF HOMELAND SEC. (June 9, 2009), https://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens.#:~:text=%E2%80%9CGranting%20deferred%20action%20to%20the,their%20legal%20status%20is%20reso lved.%E2%80%9D [https://perma.cc/A32K-ZTFF].

130. Immigration and Nationality Act, § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i); *see also*, *Green Card (Permanent Resident Card) for a Widow(er) of a U.S. Citizen*, U.S. CITIZENSHIP & IMMIGR.

A final illustration of how a policy on prosecutorial discretion serves as a stopgap to legislation in the modern era is related to the announcement by former President Barack Obama of a Deferred Action for Childhood Arrivals (DACA) policy.[131] To recap, DACA allows certain noncitizens who entered the United States before the age of sixteen and who meet other requirements to request for deferred action from USCIS. In rolling out DACA from the Rose Garden of the White House, President Obama discussed the delay by Congress in passing the DREAM Act, which is legislation that would create a durable status and pathway to citizenship for dreamers. He stated that, "This is not a path to citizenship. It's not a permanent fix. This is a temporary stopgap measure that lets us focus our resources wisely while giving a degree of relief and hope to talented, driven, patriotic young people."[132] Since 2001 through the present, various legislation has been introduced to provide a durable status and an ultimately permanent pathway to those with DACA or DACA- like qualities. Indeed, on June 12, 2021, the nine-year anniversary of DACA, advocates and institutes were vocal in their position in support of DACA and calls for a more permanent solution.[133] And on July 17, 2021, on the heels of a court decision from a federal district court in Texas blocking which blocked individuals from seeking DACA for the first time after deeming the policy unlawful, President Joe Biden committed to passing a legislation known as the American Dream and Promise Act: "I have repeatedly called on Congress to pass the American Dream and Promise Act, and I now renew that call with the greatest urgency."[134]

SERVS. (July 13, 2020), https://www.uscis.gov/forms/explore-my-options/green-card-permanent-resident-card-for-a-widower-of-a-us-citizen [https://perma.cc/V34L-CURQ] (last updated July 13, 2020).

131. *See I-821D, Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 5, 2021),https://www.uscis.gov/i-821d [https://perma.cc/KE2Z-YSK8].

132. *Remarks by the President on Immigration*, THE WHITE HOUSE (June 15, 2012, 2:09 PM), https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration [https://perma.cc/E4PS-6HGJ].

133. *See* Alexandra Limon, *9 years of DACA, Dreamers Still Wait for Path to Citizenship*, BORDER REPORT (June 15, 2021, 4:46 PM), https://www.borderreport.com/regions/washington-d-c/9-years-of-daca-dreamers-still-wait-for-path-to- citizenship/ [https://perma.cc/NHK9-AQCE]; *Pathways to Citizenship for Undocumented Immigrants*, FWD.US (June 14, 2021), https://www.fwd.us/news/pathway-to-citizenship/ [https://perma.cc/N3DQ-78BY] (last visited June 23, 2021); Anabel Mendoza, *To Commemorate 9 Years of DACA, We're Using Our Power to Demand President Biden and Democrats Deliver Citizenship for Millions!*, UNITED WE DREAM (June 15, 2021), https://unitedwedream.org/press/for-9-years-our-communities-defended-and-protected-daca-its-time-to-win-citizenship-for-millions/.

134. *Statement by President Joe Biden on DACA and Legislation for Dreamers*, THE WHITE HOUSE (July 17, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/17/statement-by-president-joe-biden-on-daca-and-legislation-for-dreamers/ [https://perma.cc/AM9U-CKUA].

VI. CONTEMPORARY CIVIL DISOBEDIENCE

Any conversation about modern prosecutorial discretion necessarily involves how those who engage in civil disobedience or political actions are treated and specifically whether enforcement action is taken against those who are exercising their legal rights. The organized civil disobedience exercised by Chinese opposing the Geary Act and detailed in part IV also allows for a comparison between the Chinese exclusion era and today.

A. Civil Disobedience and the U.S. Constitution

The relationship between civil disobedience and prosecutorial discretion surfaces when enforcement decisions are constitutionally suspect. In these cases, protection through prosecutorial discretion is extended, not for purely humanitarian or economic reasons, but rather to avoid a legal problem. Lawyers have recently described how increased releases from immigration detention have been prompted as a method for avoiding constitutional concerns. In one study by the Immigration Law Clinic at Tulane University Law School examining the 499 habeas cases filed in the Western District of Louisiana, more than one-fifth of immigrants were released before a court decided.[135] The authors said, "The releases deny immigrants who have been detained up to several years the vindication of their legal rights. Furthermore, because the releases end the legal case challenging detention, ICE may be using these releases to avoid negative court decisions that make formal rulings regarding prolonged, indefinite and punitive detention."[136]

B. Shifting Administrations

Important to the conversation about civil disobedience and prosecutorial discretion in the modern era is the degree to which shifting administrations impact whether political action and community attention are treated as a tool for protection or enforcement action. There is also an important comparative point to the Chinese exclusion era as the very public and massive act of civil disobedience by Chinese in opposition to the Geary Act resulted in protection but, in the modern era, the outcomes have varied. Under the Clinton administration, in 2000, former INS Commissioner Doris Meissner included "publicity" as a reason for why an INS officermay choose

135. *No End in Sight: Prolonged and Punitive Detention of Immigrants in Louisiana*, TULANE UNIVERSITY LAW SCHOOL IMMIGRATION RIGHTS CLINIC 12 (May 2021), https://law.tulane.edu/sites/law.tulane.edu/files/TLS%20No%20End%20In%20Sight%20Single%20Pages%20FINAL.pdf [https://perma.cc/D2HA-CQLB].

136. *Id.* at 13.

to exercise its discretion favorably towards an individual.[137] The Meissner Memo included the following excerpt:

> Community attention: Expressions of opinion, in favor of or in opposition to removal, may be considered, particularly for relevant facts or perspectives on the case that may not have been known to or considered by the INS. Public opinion or publicity (including media or congressional attention) should not, however, be used to justify a decision that cannot be supported on other grounds. Public and professional responsibility will sometimes require the choice ofan unpopular course.[138]

As the policy and role of community attention and activism in prosecutorial discretion may change from one administration to the next, individuals can experience this discretion differently over time. Ravi Ragbir is a community activist and undocumented immigrant from Trinidad. Ragbir immigrated to the U.S. in 1991 on a valid visa[139] and became a lawful permanent resident in 1994. His wife and daughter are U.S. citizens.[140] Ragbir was placed in removal proceedings following a criminal conviction for wire fraud in 2001[141] and, based on this conviction, was placed in removal proceedings and order removed with a final order of removal.[142]

In 2008, Ragbir was released from immigration custody and issued a form of prosecutorial discretion called "order of supervision" or OSUP.[143] An OSUP is a commonly used form of prosecutorial discretion and exercised after a removal order has been entered. Many people with OSUP are required to remain within a geographical location and to "check in" with a local ICE office on a periodic basis. Like with its cousin deferred action, a person with OSUP can apply for work authorization with the US Citizenship and Immigration Services upon a showing of economic necessity.[144] While Ragbir was on an OSUP, he has also worked as the Executive Director of the New Sanctuary Coalition, a multi-faithimmigrant advocacy organization with grassroots programs that include a pro se immigration clinic,

137. Memorandum from Doris Meissner, Comm'r, Immigr. & Naturalization Serv., to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel, Exercising Prosecutorial Discretion, *supra* note 49, at 8.

138. *Id.*

139. *See* Rozina Ali, *In Arresting an Immigrant-Rights Activist, ICE Shows Its New Power*, THE NEW YORKER, (Jan. 17, 2018), at 2, https://www.newyorker.com/news/news-desk/in-arresting-an-immigrant-rights-activist-ice-shows-its-new-power [https://perma.cc/C2BT-8SQ8]; *see also,* SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 38 (2019).

140. Brief in Opposition at 3, Albence v. Ragbir, No. 19-1046 (2d Cir. Apr. 25, 2019).

141. *See* United States v. Ragbir, 38 F. App'x 788, 789 (3d Cir. 2002).

142. Brief in Opposition at 3, Albence v. Ragbir, No. 19-1046 (2d Cir. Apr. 25, 2019).

143. Brief in Opposition at 4, Albence v. Ragbir, No. 19-1046 (2d Cir. Apr. 25, 2019). For an empirical study of ordersof supervision and related internal guidelines from the ICE obtained by the author through the Freedom of Information Act, see Shoba Sivaprasad Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. RACE & L. 1 (2016).

144. 8 C.F.R. § 274a.12(c)(18).

accompaniment, anti-detention, and community organizing and advocacy. For years, he worked as an immigration activist while also protected under prosecutorial discretion. As described by his attorney, scholar and organizer, Alina Das in her book No Justice in the Shadows: "An immigrant rights leaders who organized faith communities across the country, Ravi fought for the rights of other immigrants for a decade while his own deportation case hung in the balance."[145]

The landscape changed during the Trump administration when those with old removal orders, like Ragbir's, were listed as actual priorities for enforcement and, by some accounts, explicitly targeted political activists.[146] Here, the change in administration should not be overstated—Das reflected on the words of Democrat Barack Obama when he explained "Felons, not families. Criminals, not children."[147] She continued, "But where did that leave a person like Ravi – a hardworking man with a family and a felony conviction? On which side of the line between good and bad immigrants did he belong?"[148] Nevertheless, in 2018, after years under an OSUP, Ragbir was taken into ICE custody during a regular check-in.[149] As of this writing, Ragbir is out of custody and has a three-year reprieve from deportation based on settlement tied to a lawsuit centered on the First Amendment.[150]

Gaby Pacheco is another activist and community leader whose political activities made her vulnerable to immigration enforcement. Pacheco and other undocumented students led the Trail of Dreams, a four-month walk from Miami to Washington D.C. during which the group made stops in U.S. cities and received media attention about their plight.[151] In 2013, she became

145. ALINA DAS, NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRATION 1 (2020).

146. Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017); Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot., Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enf't, Lori Scialabba, Acting Dir., U.S. Citizenship & Immigr. Servs., Joseph B. Maher,Acting Gen. Couns., Dimple Shah, Acting Assistant Sec'y for Int'l Affairs, Chip Fulghum, Acting Undersecretary for Mgmt., Enforcement of the Immigration Laws to Serve the National Interest 2 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to- Serve-the-National-Interest.pdf [https://perma.cc/T9A2-BZBC]; WADHIA, *supra* note 139, at 61 (2019).

147. DAS, *supra* note 145, at 3.

148. *Id*.

149. WADHIA, *supra* note 139, at 38.

150. Nick Pinto, *Ice Settles With Immigrant Rights Leader Who Sued Over First Amendment Violations*, THE INTERCEPT (Feb. 24, 2022 9:27A.M.), https://theintercept.com/2022/02/24/ice-ravi-ragbir-deportation-first-amendment/ [https://perma.cc/VF3H-FVAN].

151. *See Maria Gabriela "Gaby" Pacheco*, THEDREAM.US, https://www.thedream.us/about-us/staff/maria-gaby-pacheco/ [https://perma.cc/3LCF-6ZUN] (last visited June 23, 2021); Aarti Shahani, *She Made DACA Happen*, WBEZ CHICAGO (Mar. 25, 2021, 3:00 AM), https://www.wbez.org/stories/gaby-pacheco-corners-the-president/15bfd5e4-00b9-4eaa-b8a6-5858b707919b [https://perma.cc/3WY6-D9ZK].

the first undocumented Latina to testify before Congress.[152] Prosecutorial discretion protected Pacheco during this period of activism.

A final case study of political activists and prosecutorial discretion centers on undocumented youth organizing for themselves and others during the Obama administration. In 2012, a group of undocumented activists, who were members of the National Immigrant Youth Alliance, intentionally got themselves arrested by Border Patrol.[153] In a related film *the Infiltrators*, two activists with DACA status, Marco and Viridiana, along with fellow activists, advocated for undocumented persons being held at the Broward Transitional Center in Florida by getting arrested.[154]

One of the main characters in the *Infiltrators* is Claudio Rojas. The film details the conditions of Rojas's detention while at the Broward Transitional Detention Center and while he goes on a hunger strike.[155] Rojas describes his story:

> On TV, President Obama was saying deportations should be focused on people who "endanger our communities." None of us in detention was a danger. Many had citizen spouses, and many, like me, had no criminal record. A group of DREAM activists 'infiltrated' the detention center, getting detained on purpose, to work with me to build a campaign and demand that detainees be freed. We launched a hunger strike, earned national media attention, and moved 26 members of Congress to sign a letter demanding an investigation. After seven months, I was finally released and reunited with my family. We cried, but from happiness.[156]

Once released from detention, Rojas, like Ragbir, checked in with a local ICE office and lived peacefully with his family because prosecutorial discretion prevented his deportation. The response by the Trump administration following the release of the film was striking. Days before Rojas was scheduled to speak at a film festival featuring *the Infiltrators* about his role in the film, the administration deported him in 2019 after living for twenty years in the United States.[157] Said Das, Rojas' attorney, "These actions made international headlines precisely because they sent a message:

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152. *Maria Gabriela "Gaby" Pacheco*, *supra* note 151.

153. Claudio Rojas, *ICE Deported Me for Appearing in a Film*, THE DAILY BEAST (Apr. 19, 2021), https://www.thedailybeast.com/ice-deported-me-for-appearing-in-a-film?ref=author [https://perma.cc/K7Y9-TSUA].

154. Teo Bugbee, *"The Infiltrators" Review: Immigrant Activists Slip Into Detention*, N.Y. TIMES (Apr. 30, 2020), https://www.nytimes.com/2020/04/30/movies/the-infiltrators-review.html [https://perma.cc/6T4E-99TT].

155. John Kiko Martinez, Leguizamo, *Alex Rivera & Others Want "Infiltrators" Subject Claudio Rojas Returned to U.S.*, REMEZCLA (Apr. 30, 2021), https://remezcla.com/film/john-leguizamo-alex-rivera-others-want-infiltrators-subject-claudio-rojas-returned-u-s/ [https://perma.cc/LQA4-4SZ6].

156. Rojas, *supra* note 153.

157. *Id*.

criticize ICE and ICE will deport you."[158] The Immigrant Rights Clinic at New York University Law School released a website called "Immigrant Rights Voices" documenting more than 1000 acts of retaliation by ICE against immigration activists.[159]

ICE has also received attention for its surveillance of activists exercising their protected First Amendment activities. Internal e-mails reveal how ICE has monitored the nonviolent protests and social media posts of individual activists and organizations that include Project South, Georgia Detention Watch, and El Refugio.[160] Said Das: "ICE's pattern of surveilling and targeting immigrant rights organizers demonstrates how afraid the agency is of being held accountable for its actions."[161]

C. The Future

How the Biden administration uses prosecutorial discretion when immigrants speak or engage in political activism remains to be seen. While the policy guidance issued as of this writing has not included "community attention," the Mayorkas Memo instructs "[a] noncitizen's exercise of their First Amendment rights also should never be a factor in deciding to take enforcement action."[162] As described earlier, this same guidance also treats those who exercise other legal rights as a mitigating factor.

Following the issuance of the Mayorkas Memo on September 30, 2021, the Biden administration started to return deported political activists who claimed they faced retaliation by ICE because of their activism. Claudio Rojas and Jean Montrevil, an immigrants' rights advocate from Haiti, were both returned to the United States.[163] The connection between the Mayorkas Memo and their return is illustrated by Secretary Mayorkas' own contribution in reaction to their return: "We have an obligation to protect the civil rights and civil liberties of every individual irrespective of their immigration status. An individual's race, religion, national origin and

158. Alex Pickett, *Deportation of Immigrant Activist Makes Waves at 11th Circuit*, COURTHOUSE NEWS SERVICE (Sept. 22, 2020), https://www.courthousenews.com/deportation-of-immigrant-activist-makes-waves-at-11th-circuit/ [https://perma.cc/J5EN-B5EM].

159. IMMIGRANT RIGHTS VOICES, https://www.immigrantrightsvoices.org/#/ [https://perma.cc/QWL5-Y493] (last visited May 28, 2021).

160. José Olivares & John Washington, *ICE Discussed Punishing Immigrant Advocates for Peaceful Protests*, THE INTERCEPT (June 17, 2021, 7:00 AM), https://theintercept.com/2021/06/17/ice-retaliate-immigrant-advocates-surveillance/ [https://perma.cc/B3BL-4U2F].

161. *Id*.

162. Memorandum from Alejandro N. Mayorkas, Sec'y, Dep't of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, Guidelines for the Enforcement of Civil Immigration Law 5 (Sept. 30, 2021) https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [https://perma.cc/TW78-JHWH].

163. Joel Rose, *Deported Activists Allowed Back Into the U.S., Saying ICE Retaliated Against Them*, WUNC 91.5 (Dec. 14, 2021 5:00PM) https://www.wunc.org/2021-12-14/deported-activists-allowed-back-into-the-u-s-saying-ice-retaliated-against-them [https://perma.cc/N69G-RUU3].

exercise of their First Amendment rights cannot be a factor in deciding to take enforcement action."[164]

How does one compare the treatment of plaintiffs-activists in *Fong Yue Ting* to the more volatile history that followed about the detention and deportation of political activists? In exchange for protesting the Geary Act as unconstitutional, the plaintiffs were shielded from deportation even after the Supreme Court determined that the federal government had the power to deport Chinese residing in the United States.

The resistance and organization by the Chinese community around the Geary Act can also be compared to the resistance to the travel ban also known as the "Muslim and African ban." Resistance to the latter arose inside courts with numerous challenges to the content based on statutory and constitutional grounds; on the streets, with demonstrations, marches, and protests by affected communities and the broader public denouncing the ban as discriminatory; and at consulates, with lawyers advocating for their clients at consulates to obtain a waiver or admission for their client or data about how the ban was being implemented.[165] While the President enacted the first two bans as Executive Orders targeting nationals from Muslim majority countries, the third ban was a presidential proclamation and prohibited the entry of certain nationals from thirteen countries. These orders and proclamation extended to nationals who qualified under immigration law for a visa based on family, employment, throughthe diversity program, or on a temporary basis.[166] Resistance also arose in the halls of Congress with the

164. *Id*.

165. *See* Shoba Sivaprasad Wadhia, *Biden Ends the 'Muslim Ban' on Day One of His Presidency but Its Legacy Will Linger*, PHILADELPHIA INQUIRER (Jan. 20, 2021), https://www.inquirer.com/opinion/commentary/biden-immigration-day-one-muslim-ban-repeal-20210120.html [https://perma.cc/RE98-5VTN]; WADHIA, *supra* note 139, at 26–28; *Stop Banning People!*, MUSLIM ADVOCATES, https://muslimadvocates.org/action/ban/ https://perma.cc/7RJM-G4HM]; Elica Vafaie, *A Year in Review: Reflections on Resistance Against the Muslim Ban*, NATIONAL IMMIGRATION LAW CENTER (April 17, 2018), https://www.nilc.org/2018/04/17/reflections-on-resistance-against-the-muslim-ban/ [https://perma.cc/H643-SNCH]; Lauren Gambino et al., *Thousands Protest Against Trump Travel Ban in Cities and Airports Nationwide*, THE GUARDIAN (Jan. 29, 2017, 7:01 PM), https://www.theguardian.com/us-news/2017/jan/29/protest-trump-travel-ban-muslims-airports [https://perma.cc/PV6P-7TGK]; NO MUSLIM BAN EVER, https://www.nomuslimbanever.com/ [https://perma.cc/77A9-BHEQ] (last visited June 23, 2021); *see also The Muslim and African Bans*, GEORGETOWN UNIVERSITY: BRIDGE, https://bridge.georgetown.edu/research-publications/reports/the-muslim-and-african-bans/ [https://perma.cc/R4DX-XFL7] (last visited May 29, 2021); Alan Taylor, *A Weekend of Protest Against Trump's Immigration Ban*, THE ATLANTIC (Jan. 30, 2017), https://www.theatlantic.com/photo/2017/01/a-weekend-of-protest-against-trumps-immigration-ban/514953/ [https://perma.cc/J7FH-2N2E].

166. *See Immigration in the Time of Trump: (Expanded) Travel Ban 3.0*, PENN STATE LAW CENTER FOR IMMIGRANTS' RIGHTS CLINIC, https://pennstatelaw.psu.edu/immigration-time-of-trump#Travel%20Ban%203.0 [https://perma.cc/E9X9-X5KE] (last visited July 30, 2021); *See also* H.R. 2214 (NO BAN Act), 116th Cong. (2019-2020); *see also*, *No Ban Act Action Center*, MUSLIM ADVOCATES, https://muslimadvocates.org/no-ban-act/ [https://perma.cc/B5FJ-UUUK] (last visited June 23, 2021); Letter to Chairman Lindsey Graham & Ranking Member Dianne Feinstein, United States Senate Committee on the Judiciary, Chairman Jerold Nadler & Ranking Member Doug Collins, United

introduction of the NO BAN Act that, if enacted, would limit the exclusionary authority of the immigration statute and repeal the Muslim ban.[167] Said the Founding Director of Muslim Advocates, Farhana Khera in her testimony before Congress on the NO Ban Act: "[N]either Congress nor the American people are institutionally bound to avoid confrontation with the animus that underlies the Ban."[168] Now, it is time for Congress to act. The lawyering and advocacy exercised over four years ultimately resulted in the repeal of the Ban on day one of the Biden presidency.[169]

VII. RACE AND IMMIGRATION

A. Immigration Enforcement and Race

The role of race in immigration enforcement and discretion is also worthy of exploration. As foreshadowed in the first section, the Chinese Exclusion Act was a racist law both facially in the way it targeted a single race but also beyond the text when considering the anti-Chinese sentiment that informed politics in California and on the national stage. One example of racism inside the Geary Act was the requirement that Chinese have "at least one credible white witness" to explain why they had not registered.[170]

The Chinese Exclusion Act and other racial exclusions persisted throughout the first half of the twentieth century and was rejected only in 1965 when Congress passed the 1965 Immigration Act, ending the national origin quotas that banned Asians from entering the United States.[171] Scholars

States House of Representatives Committee on the Judiciary from Shoba Sivaprasad Wadhia, Samuel Weiss Faculty Scholar & Clinical Professor of Law, Penn State Law, and 55 additional law professors (Mar. 29, 2019), https://pennstatelaw.psu.edu/sites/default/files/LawProfessorLetterNOBANActFinal.pdf [https://perma.cc/2WCG-ETZN].

167. H.R. 2214 (NO BAN Act), 116th Cong. (2019-2020); *see also*, *No Ban Act Action Center*, MUSLIM ADVOCATES, https://muslimadvocates.org/no-ban-act/ [https://perma.cc/B5FJ-UUUK] (last visited June 23, 2021); Letter to Chairman Lindsey Graham & Ranking Member Dianne Feinstein, United States Senate Committee on the Judiciary, Chairman Jerold Nadler & Ranking Member Doug Collins, United States House of Representatives Committee on the Judiciary from Shoba Sivaprasad Wadhia, Samuel Weiss Faculty Scholar & Clinical Professor of Law, Penn State Law, and 55 additional law professors (Mar. 29, 2019), https://pennstatelaw.psu.edu/sites/default/files/LawProfessorLetterNOBANActFinal.pdf [https://perma.cc/2WCG-ETZN].

168. *Oversight of the Trump Administration's Muslim Ban: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Immigr. &Citizenship, H. Comm. on Foreign Affairs, Subcomm. on Oversight and Investigations*, 116th Cong., at 5 (2019) (statement of Farhana Khera, President & Executive Director, Muslim Advocates), https://docs.house.gov/meetings/JU/JU01/20190924/109976/HHRG-116-JU01-Wstate-KheraF-20190924.pdf [https://perma.cc/VQB5-R93R].

169. *See* Proclamation No. 10141, 86 Fed. Reg. 7,005 (Jan. 20, 2021).

170. Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25 (1892) ("Geary Act").

171. *See* Muzaffar Chishti et al., *Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States*, MIGRATION POLICY INSTITUTE (Oct. 15, 2015), https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states [https://perma.cc/72YV-X29C]; THE ROUTLEDGE HANDBOOK ON THE AMERICAN DREAM, ch. *Migration and the Immigrant American Dream* (Robert C. Hauhart & Mitja Sardoč eds., 1st

consider the 1965 Act as a watershed legislation. The 1965 Act opened the doors to immigration from Asia and, for the first time, created a statutory framework for permanent immigration that centered on family relationships (and to a lesser degree employment) as opposed to country of birth.

Despite this, Congress put in colorblind policies into the immigration law that to the present day impact the Latinx community.[172] Dean Kevin Johnson describes how the 1965 Immigration Act, while increasing immigration from Asia, also placed barriers on legal immigration from Mexico and expanded the number of Mexican nationals in the United States who were unauthorized and deportable.[173] These barriers were made possible because of limitations to a temporary labor program and statutory caps placed on immigration·[174]

While the immigration laws are more facially neutral today, race continues to intersect with exclusion in significant and sometimes troubling ways. Modern exclusion has operated not explicitly through statute but rather through policies by the executive branch or implementation of otherwise facially neutral laws. The enactment of the Muslim and African ban under the Trump administration and specific immigration policies in the 9/11 era targeted nationals from specific countries, many were Muslim majority.[175]

Under the modern framework, the disproportionate impact of immigration enforcement on communities of color is tied to the ways criminality interacts with immigration enforcement. The source for this impact can be traced to immigration laws passed in 1996 that increased the ways the federal government can charge, detain, and deport a person. For example, Congress expanded the term "aggravated felony" to reach a wide range of conduct and in doing so, subjected a greater number of immigrants to mandatory detention and deportation.[176] Das underscores the impact on

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ed. forthcoming 2021); Edward M. Kennedy, *The Immigration Act of 1965*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 137 (1966); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75N.C. L. REV. 273 (1996).

172. *See* Kevin R. Johnson, *Bringing Racial Justice to Immigration Law,* 116 NW. U. L. REV. 1, 11 (2021).

173. Kevin R. Johnson, *The Beginning of the End: The Immigration Act of 1965 and the Emergence of the Modern U.S.-Mexico Border State*, *in* THE IMMIGRATION AND NATIONALITY ACT OF 1965: LEGISLATING A NEW AMERICA 116-170 (G. Chin & R. Cuison Villazor eds., 2015).

174. *See e.g.,* Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 POPULATION DEV. REV. 1 (2012) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3407978/ [https://perma.cc/CM6B-GGQZ] ("In sum, illegal migration rose after 1965 not because there was a sudden surge in Mexican migration, but because the temporary labor program had been terminated and the number of permanent resident visas had been capped, leaving no legal way to accommodate the long-established flows.").

175. *See e.g.*, WADHIA, *supra* note 139, at 7–11; Hu & Wadhia, *supra* note 13; Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*,114 PENN ST. L. REV. 1485 (2010).

176. *See* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43); Socheat Chea, *The Evolving Definition of an Aggravated Felony*, INSTITUTE OF CONTINUING LEGAL EDUCATION IN GEORGIA (1999),

Black immigrants: "Because of the intersection of immigration and criminal law, Black immigrants are more likely to encounter the criminal legal system and therefore more likely to confrontimmigration enforcement."[177]

The racial disparities in immigration enforcement are not limited to those who enter the system following an encounter with the criminal justice system. Immigrants of color are also overrepresented in immigration detention, which today represents one of the largest forms of mass incarceration.[178] Notably, immigration detention itself is a "civil" system which means that an individual may enter ICE custody for reasons that are separate or in addition to their time in the criminal system.[179] Data from DHS indicates that the majority of initial admissions to ICE detention facilities were nationals from Guatemala, Mexico, Honduras, El Salvador, and Cuba.[180] DHS enforcement impacts Black immigrants differently in family detention and solitary confinement. According to RAICES, nearly half of families detained by ICE in 2020 were from Haiti while Haitian immigrants account for less than 2% of the U.S. population.[181] 24% of those held in solitary confinement by ICE were from Africa and the Caribbean.[182] DHS has the discretion to detain an individual before, during, or after the removal process.

Race also intersects with deportations. In 2019, DHS deported 360,000 individuals— 90 percent of removals were nationals from Mexico, Guatemala, Honduras, and El Salvador.[183] Das has written about the racialized impact of removals: "More than 95 percent of immigrants removed annually from the United States are from Mexico and Central America, a percentage much higher than Latinx representation in the

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https://static1.squarespace.com/static/54355dfbe4b02f8e532c0cf0/t/5733986f2eeb81bb8a557ef5/1462999152130/ [https://perma.cc/Q3YL-CKY6]. *See also* DefinitionFelony.pdf; Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & C.R. L. REV. 387, 394–96 (2007).

177. DAS, *supra* note 145, at 84.

178. *See e.g.*, EMILY RYO & IAN PEACOCK, AMERICAN IMMIGRATION COUNCIL, THE LANDSCAPE OF IMMIGRATION DETENTION IN THE UNITED STATES (2018), https://www.americanimmigrationcouncil.org/research/landscape-immigration-detention-united-states [https://perma.cc/QV59-UP9S].

179. AMERICAN IMMIGRATION COUNCIL, TWO SYSTEMS OF JUSTICE: HOW THE IMMIGRATION SYSTEM FALLS SHORT OF AMERICAN IDEALS OF JUSTICE (March 2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf [https://perma.cc/VYV7-3FJQ].

180. MIKE GUO, U.S. DEP'T OF HOMELAND SEC.: OFF. OF IMMIGR. STAT., ANNUAL FLOW REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2019 9–10 (2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement_actions_2019.pdf [https://perma.cc/9NG4-5XWM].

181. *Black Immigrant Lives Are Under Attack*, REFUGEE & IMMIGRANT CTR. FOR EDUC. & LEGAL SERVS. (RAICES), https://www.raicestexas.org/2020/07/22/black-immigrant-lives-are-under-attack/ [https://perma.cc/TA46-L5XD] (last visited July 30, 2021).

182. *Id*.

183. MIKE GUO, U.S. DEP'T OF HOMELAND SEC.: OFF. OF IMMIGR. STAT., ANNUAL FLOW REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2019 8 (2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement_actions_2019.pdf [https://perma.cc/H9GU-FGU5].

nation's immigrant's population."[184] Black Alliance for Immigrant Justice or BAJI has also documented the continued deportations of Black immigrants to Haiti, Cameroon, Congo, Angola, and other Caribbean and African countries even in the wake of President Biden's enforcement memo to restore prosecutorial discretion.[185]

B. Prosecutorial Discretion and Race

Beyond the impact of immigration enforcement actions on specific nationalities or races are the choices to *refrain* from immigration enforcement. In contrast to the prosecutorial discretion used in the wake of *Fong Yue Ting*, more recent acts of positive prosecutorial discretion have not protected a single race in the same way that Chinese persons and persons of Chinese descent were shielded from deportation. Some potential reasons tied to the discretion exercised to protect Chinese as a class include the existence of an explicitly race-based exclusionary policy, the role of the Chinese Six Companies, and the overall organization of the Chinese community. By contrast, DACA serves as one example where discretion was exercised to a wide range of nationalities—approvals have extended to multiple nationalities, including but not limited to, nationals from Mexico, El Salvador, Guatemala, Honduras, South Korea, Peri, Brazil, Ecuador, Colombia, the Philippines, Argentina, and India.[186] Similarly, data sets received from the Department of Homeland Security by this author through Freedom of Information Act request(s) show that deferred action approvals outside of the DACA program have extended to nationals from Mexico, Guatemala, El Salvador, and Peru.[187]

Importantly, race has been identified in case law and policy guidelines as an impermissible factor to use when making immigration enforcement decisions. When describing the factors that may not be considered when making prosecutorial discretion decisions, the Meissner Memo states: "There are factors that may not be considered. Impermissible factors include: An individual's race, religion, sex, national origin, or political association, activities or beliefs."[188] The Mayorkas Memo includes similar language. In

184. DAS, *supra* note 145, at 83.

185. Ed Pilkington, *Outcry as More than 20 Babies and Children Deported by US to Haiti*, THE GUARDIAN (Feb. 8, 2021, 6:21 PM), https://www.theguardian.com/us-news/2021/feb/08/us-ice-immigration-customs-enforcement-haiti- deportations [https://perma.cc/HUN5-G9WK].

186. *Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, Status, by Fiscal Year, Quarter, and CaseStatus: Aug. 15, 2012-Jun. 30, 2020*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/sites/default/files/document/reports/DACA_performancedata_fy2020_qtr3.pdf [https://perma.cc/G3B5-6YJA] (last visited May 27, 2021).

187. WADHIA, *supra* note 1, at 83.

188. Memorandum from Doris Meissner, Comm'r, Immigr. & Naturalization Serv., to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel, Exercising Prosecutorial Discretion, *supra* note 49, at 9.

the criminal space, challenging a prosecutorial discretion or selective enforcement on constitutional grounds is subject to a high standard because it requires a person to show discriminatory intent by the prosecutor. Said the Supreme Court in a case involving a selective prosecution claim by petitioners who believe they were criminalized on drug charges based on their race:

> In order to prove a selective-prosecution claim, the claimant must demonstrate that the prosecutorial policy had a discriminatory effectand was motivated by a discriminatory purpose. To establish adiscriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.[189]

Says criminal justice scholar Angela Davis: "One reason this standard is so difficult to meet is that much of the discriminatory treatment of defendants and victims may be based on unconscious racism and institutional bias rather than on discriminatory intent."[190] Davis discusses how prosecutorial discretion can serve as a tool for reducing racial inequities: "[P]rosecutors, through their overall duty to pursue justice, have the responsibility to use their discretion to help eradicate the discriminatory treatment of African Americans in the criminal justice system."[191]

Compared to the criminal space, the standard for bringing a selective enforcement claim in the immigration arena is even higher, in part due to the Supreme Court's casting of immigration as distinct from "punishment." The Supreme Court concluded: "Our holding generally deprives deportable aliens of the defense of selective prosecution.…"[192] The Court continued, "Whereas in criminal proceedings the consequence of delay is merely to postpone the criminal's receipt of his just deserts, in deportation proceedings the consequence is to permit and prolong a continuing violation of United States law."[193] The Court has acknowledged the scenario in which immigration enforcement may be impermissible as a constitutional matter but has done so narrowly: "To resolve the present controversy, we need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome."[194]

Historically, except for DACA, little data has been collected or published by the government about the nationality of those protected under

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189. United States v. Armstrong, 517 U.S. 456, 457 (1996) (internal citation omitted).

190. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998).

191. *Id.*

192. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 n.10 (1999).

193. *Id*. at 490.

194. *Id*. at 491. *But see* the dissent from Justice Ruth Bader Ginsburg: "Under our selective prosecution doctrine, 'the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights.'" *Id.* at 497 (citing Wayte *v.* United States*,* 470 U. S. 598, 608 (1985)). (internal citations and quotation marks omitted). "I am not persuaded that selective enforcement of deportation laws should be exempt from that prescription." *Id.*

a form of prosecutorial discretion, nor the reasons for why a person should be granted or denied a form of prosecutorial discretion. This author has sorted through some of this data based on responses to FOIA.[195] The Mayorkas Memo prioritizes data collection noting "We will need to collect detailed, precise, and comprehensive data as to every aspect of the enforcement actions we take pursuant to this guidance, both to ensure the quality and integrity of our work and to achieve accountability for it."[196] Collecting and publishing data about the outcomes along with the race and nationality of those subject to an immigration enforcement action is crucial to understanding the racial impact of prosecutorial discretion. Such data collection would also aid the principle in the Mayorkas Memo to "ensure that enforcement actions are not discriminatory and do not lead to inequitable outcomes."[197]

Another reform that could identify or improve racial disparities in prosecutorial discretion decisions is to replace what it currently a covert structure to one that is more transparent and predictable. This might include the publication of quarterly statistics on the discretionary decisions made at each stage of immigration enforcement and a use of these statistics to determine if policy should be changed. For example, if DHS determines that certain nationalities or races are arrested or detained by ICE at higher rates than the overall immigrant population eligible for enforcement, this might require a shift in the policy leading to such arrests or detentions in the first place and in a universe of limited resources and wide discretion that should lead to equitable outcomes and avoid constitutional questions.[198] In previous work, this author has interrogated why transparency in prosecutorial discretion matters and advocated for rulemaking.[199]

CONCLUSION

This Article documented some of the earliest uses of prosecutorial discretion in the immigration system and considered how it ties to the modern history and application of prosecutorial discretion. The history documented in the Chinese Exclusion era provides an understanding of the landscape that resulted in the protection of an entire class from deportation. This Article also considered the degree to which civil disobedience informs prosecutorial discretion choices by the government after *Fong Yue Ting* and

195. *See* WADHIA, *supra* note 1.

196. Memorandum from Alejandro N. Mayorkas, Sec'y, Dep't of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, Guidelines for the Enforcement of Civil Immigration Law 6 (Sept. 30, 2021) https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [https://perma.cc/H6X7-3ATU].

197. *Id*. at 5.

198. *See e.g.,* Letter from Shoba Sivaprasad Wadhia & Others, to Alejandro N. Mayorkas, Sec'y of the Dep't of Homeland Sec., (Aug. 24, 2021) (on file with Penn State Law) https://pennstatelaw.psu.edu/sites/default/files/Final%20Law%20Prof%20Letter%20Aug%202021.pdf [https://perma.cc/V5E2-QX5Z].

199. See WADHIA, *supra* note 1, at 134–45.

its contrast to the way discretion is being (mis)applied to civil disobedience actions by immigrants in the modern era. Finally, this Article analyzed the intersection of race and discretion in the creation and implementation of the Geary Act, contemporary exercises of prosecutorial discretion, and the conditions that cause racial disparities. Understanding the history and texture of prosecutorial discretion in immigration will help provide a foundation for future policy.